Supreme Court, U.S.
FILED
061479 MAY 7 - 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RICHARD A. CANATELLA, PETITIONER

v.

RONALD W. STOVITZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Consistent with the constitutional guarantee of freedom of expression and the First Amendment jurisprudence of this Court, what standard of judicial review applies to the speech of attorneys acting in an official capacity as against over broad and vague attorney discipline statutes that allegedly chill protected speech through suspension and disbarment, *inter alia*, for doing an act of "moral turpitude," or doing something other than what is "legal or just," "with a corrupt motive of passion or interest," or "without probable cause"?

PARTIES TO THE PROCEEDING

RICHARD A. CANATELLA, Petitioner

RONALD W. STOVITZ, Presiding Judge of the State Bar Court, San Francisco; JUDITH A. EPSTEIN, Review Judge, San Francisco; MADGE S. WATAI, Review Judge, Los Angeles; RICHARD A. HONN, Hearing Judge, Los Angeles; PATRICE E. MCELROY, Hearing Judge, San Francisco; ALBAN I. NILES, Hearing Judge, Los Angeles; JOANN M. REMKE, Hearing Judge, San Francisco; ROBERT M. TALCOTT, Supervising Hearing Judge, Los Angeles; JAMES E. HERMAN, President of the Board of Governors of the State Bar of California; MICHAEL NISPEROS, JR., Chief Trial Counsel; RICHARD A. PLATEL, Hearing Judge, Los Angeles; JOHN VAN DE KAMP, President of the Board of Governors of the State Bar of California; RUSSELL MICHAEL NISPEROS, JR., Chief Trial Counsel, Respondents

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OPINION BELOW

Canatella v. Stovitz, 2006 U.S. App. LEXIS 29985 (9th Cir. Dec. 6, 2006) (*Canatella II*), affirming dismissal of the complaint in *Canatella v. Stovitz*, 2005 U.S. Dist. LEXIS 5976 (N.D. Cal. Feb. 16, 2005).

JURISDICTION

The Ninth Circuit Court of Appeals issued its memorandum opinion December 6, 2006. Petitioner timely petitioned for rehearing and rehearing en banc December 20, 2006. The petition was denied February 6, 2007. This Court has jurisdiction under 28 U.S.C. section 2101(c), and the petition is timely under Supreme Court Rule 13.3.

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment I states in relevant part:

> "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, ..."

United States Constitution, Amendment XIV states in relevant part:

> "... [N]or shall any State deprive any person of life, liberty, or property without due process of law...."

California Business and Professions Code section 6068(c) provides in pertinent part:

"It is the duty of an attorney ... to counsel or maintain such actions, proceedings or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." Cal. Bus. & Prof. Code, § 6068(c)....."

California Business and Professions Code section 6068(g) provides in pertinent part:

"It is the duty of an attorney ... [n]ot to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Cal. Bus. & Prof. Code, § 6068(g).

California Business and Professions Code section 6103 provides in pertinent part:

"A willful disobedience or violation of an order of the court requiring him to do an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitutes cause for disbarment or suspension." Cal. Bus. & Prof. Code, § 6103.

California Business and Professions Code section 6106 provides in pertinent part:

"The commission of any act involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor, constitutes a cause

for disbarment and suspension." Cal. Bus. & Prof. Code, § 6106.

California Rules of Professional Conduct 3-200 provides in pertinent part:

> "A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law ..." Cal. Rule of Prof. Conduct 3-200.

STATEMENT

This case arises out of First and Fourteenth Amendment challenges to California attorney disciplinary statutes and a rule of professional conduct against named California State Bar Court judges,[1] and

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[1] *Obrien v. Jones* (2000) 23 Cal.4th 40, 49-50: " ... [I]n 1988 the Legislature directed the creation of the State Bar Court, and also provided for the appointment of State Bar Court judges, (and) the decision to utilize and to rely upon the legislatively created disciplinary structure was reserved to this court. Furthermore, although we have chosen to utilize the assistance of the State Bar Court in deciding admission and discipline matters, we also have prescribed procedures and criteria for the evaluation, selection, and appointment of State Bar Court judges, as well as procedural rules for the State Bar Court itself, that are separate from--and sometimes *different* from--those in the statutory provisions." Id.

other Bar officials in their official capacities. In 1998, the district court dismissed the complaint, *sub. nom.*, *Canatella v. California*, 1998 U.S. Dist. LEXIS 15296 (N.D. Cal. Sept. 29, 1998). However, the Ninth Circuit reversed the dismissal in a published opinion *sub. nom.*, *Canatella v. California*, 304 F.3d 843 (9th Cir. 2002) (*Canatella I*) involving the same challenge to California disciplinary statutes and a Bar rule of professional conduct presented on this petition.

On remand to the district court, Petitioner sought prospective relief under 42 U.S.C. § 1983, again claiming the challenged California disciplinary statutes and rule of professional conduct had a chilling effect on official attorney speech in violation of the First and Fourteenth Amendments to the United States Constitution. The district court dismissed once again under Federal Rule of Civil Procedure 12(b)(6) and denied leave to amend, *sub. nom. Canatella v. Stovitz*, 2005 U.S. Dist. LEXIS 5976 (N.D. Cal. Feb. 16, 2005). A different panel of the Ninth Circuit affirmed in an unpublished memorandum opinion. *Canatella v. Stovitz*, 2006 U.S. App. LEXIS 29985 (9th Cir. Cal. Dec. 6, 2006) *6-7 (*Canatella II*). Petitioner timely petitioned for rehearing and rehearing en banc December 20, 2006, and the petition was denied February 6, 2007. This timely petition for the Writ of Certiorari follows.

Petitioner has practiced law in California since 1972. He is licensed to practice in California and the District of Columbia, and is a member of the bars of the United States District Courts for the Northern and Central districts of California, the Ninth Circuit Court of Appeals, the United States Court of Military Appeals, and the Supreme Court of the United States. Prior to 1998, Petitioner had no record of discipline

before any court or bar. In 1989 through 1996, however, petitioner assumed responsibility for two controversial cases. One involved a "shaken baby" murder charge against a babysitter, and the other involved alleged civil rights violations as applied to debt collection practices. In these two cases petitioner was sanctioned twenty-five times. Petitioner received a twenty-sixth sanction order in a third case. All of the sanctions levied against Petitioner concerned his activities as an advocate of his clients' interests in judicial proceedings. *See Canatella v. California*, 304 F.3d 843 (9th Cir. 2002) (*Canatella I*), and *Canatella v. Stovitz*, 2005 U.S. Dist. LEXIS 5976 (N.D. Cal. Feb. 16, 2005) ("*Stovitz*").

Petitioner's difficulties with the State Bar of California ("State Bar") did not surface until a front-page feature was published in the official legal newspaper, *The San Francisco Recorder* August 21, 1992. The defamatory article portrayed Petitioner as an attorney who files "frivolous" actions. In 1993 the State Bar of California initiated a disciplinary investigation into the multiple sanctions orders. Prior to notice of disciplinary charges, however, Petitioner filed a section 1983 action seeking to enjoin the disciplinary action, and a declaration that the California discipline statutes (four California statutes and one rule of professional conduct) were unconstitutional for overbreadth and vagueness. The statutes are approximately 124 years old and contain no severability provisions.

The statutes make it an offense to "counsel or maintain such actions, proceedings, or defenses as appear to him or her [not] to be legal or just,..." (Cal. Bus. & Prof. Code section 6068(c)); "encourage the commencement or continuance of an action or

proceeding from [a] corrupt motive of passion or interest" (Cal. Bus. & Prof. Code section 6068(g)); "willful[ly] disobe[y] or violat[e] an order which he ought in good faith to do or forbear" (Cal. Bus. & Prof. Code section 6103); "commi[t] any act involving moral turpitude" (Cal. Bus. & Prof. Code section 6106); and "assert a position without probable cause and for the purpose of harassing or maliciously injuring another," or "present a claim or defense that is not warranted under existing law, unless it can be supported by a good faith argument" (Cal. Rule of Prof. Conduct 3-200).[2]

Central to Petitioner's challenge in the Ninth Circuit was the claim that on their face the provisions abridge a substantial amount of protected speech of California attorneys. Over a century ago, these provisions were intended to impose precatory, as opposed to mandatory precepts. Now, however, they are broadly applied to abridge attorney speech without the requirement of fair notice of that speech which is required and that speech which is prohibited.

REASONS FOR GRANTING THE PETITION

I. SEVENTEEN YEARS HAVE PASSED SINCE THE COURT DECIDED *GENTILE*, LEAVING UNANSWERED THE QUESTION OF WHAT STANDARDS APPLY TO ATTORNEY SPEECH THAT AFFECTS CONSTITUTIONAL RIGHTS, LIKE THE RIGHT TO A FAIR TRIAL.

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[2] The full text of the California attorney disciplinary statutes and rule of professional conduct is set forth in the "Constitutional And Statutory Provisions Involved", *supra*.

Seventeen years ago, this Court held that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar*, 501 U.S. 1030, 1071 (1991) (*Gentile*).[3] Even outside the courtroom, this Court has observed that lawyers are not "protected by the First Amendment to the same extent as those engaged in other businesses." *Gentile*, 501 U.S. at 1073. The Court explained that the task for a court in analyzing out-of-court attorney speech is to "engage[] in a *balancing* process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech . . . at issue." *Id.* The latter explanation has evoked some criticism.[4]

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[3] Attorney Dominic Gentile held a pretrial press conference in which he declared the innocence of his client Grady Sanders, who was indicted on criminal charges, and suggested that certain corrupt members of the local police department were more logical suspects. After obtaining an acquittal on behalf of Sanders, Gentile was subjected to professional discipline under Nevada Rule 177 for comments he made during the press conference. A sharply divided Court ultimately decided that Gentile should not have been subject to discipline. *See id.* at 1058 (holding that "[i]t cannot be said that petitioner's conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment").

[4] *See* W. Bradley Wendel, *Free Speech for Lawyers*, 28 Hastings Const. L.Q. 305, 310-311: "In this article I do not propose some variation on the ubiquitous balancing tests that have multiplied in constitutional law, in which the interests of the client, the lawyer, the court system, affected third parties, and society are generally weighed against one another on some miraculous multidimensional scale. (*footnote omitted.*) A significant camp of First Amendment scholars contends that flexibility and "thinking small" is the hallmark of free speech doctrine, and courts should not be preoccupied with the search for rules that apply without

However, to this day no court has come to grips with what one scholar has described as one of "the most important unanswered questions in legal ethics" (*i.e.*, "[H]ow the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys acting in their official capacity.")[5] Respectfully, the time is now.

The challenged discipline provisions can reasonably be viewed as making a political state of mind the punishable act.[6] For the aim of the challenged

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sensitivity to contextual variations. (*footnote omitted.*) There is a great deal of truth in this position, but the response to the diversity of circumstances of individual cases is to work harder to discern the principles and policies which undergird First Amendment adjudication in analogous cases, not to abdicate this function by purporting to balance numerous incommensurable factors. ..." *Id.*

[5] *See* W. Bradley Wendel, *Free Speech for Lawyers*, 28 Hastings Const. L.Q. 305, note 1 (2001) (Wendel): "One of the most important unanswered questions in legal ethics is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys acting in their official capacity. The Supreme Court has addressed numerous First Amendment issues involving lawyers, of course, but in all of them has declined to consider directly the central conceptual issue of whether lawyers possess diminished free expression rights, as compared with ordinary, non-lawyer citizens. Despite its assiduous attempt to avoid this question, the Court's hand may soon be forced. Free speech issues are proliferating in the state and lower federal courts, and the results betoken doctrinal incoherence. ..."

[6] *See, e.g.*, to "counsel or maintain such actions, proceedings, or defenses as appear to him or her [not] to be legal or just,..." section 6068(c); "to encourage the commencement or continuance of an action or proceeding from [a] corrupt motive of passion or interest," section 6068(g); to "commi[t] any act involving moral turpitude, dishonesty or corruption," section 6106; and "to assert a

provisions is not only expressive conduct,[7] but also, the attorney's thoughts about "legal or just", "corrupt motive of passion or interest", "moral turpitude, dishonesty or corruption", "good faith", "probable cause", and "warranted under existing law". What *is* being regulated and punished is not an act incident to the representation of clients, but thoughts about the redress of client grievances expressed by an attorney acting in her official capacity, often in a courtroom, the most effective forum for political expression aimed at redress of grievances. And worse than the regulation of her own thoughts about how the client's grievances might best be addressed, an attorney is being punished for the thoughts of a client in consulting, bringing or defending a case, and not for her own thoughts!

For example, an attorney is punished if a State Bar employee *thinks* that the attorney *thought* a client's action was not "legal or just," or "encourag[ed] the commencement or continuance of [the] action or proceeding from [a] corrupt motive of passion or interest," or what another person (*i.e.*, a lawyer or client) thought, and that thought was "corrupt" leading to speech brought from "motives of passion or interest." In other words, an attorney may be punished when a bar employee *thinks* what the attorney's *thoughts* should have been (*i.e.*, that in "*good faith*" she should

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position without probable cause and for the purpose of harassing or maliciously injuring any person." Cal. R. of Prof. Conduct 3-200.

[7] *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973), making clear that this Court will entertain facial freedom of expression challenges to statutes that, "by their terms," seek to regulate "spoken words" or patently "expressive or communicative conduct".

have complied with a court order), or what the attorney *should think* is an immoral act and does it anyway, or worse, what the client is *thinking*, and the thoughts of the client are to "harass or maliciously" injure another, and those *thoughts* should be imputed to the attorney.

Such punishment for the attorney's attempt to redress client grievances could well be politically motivated. For attorney speech implicates the First Amendment's core protection of political speech in two fundamental ways. First, in a common-law system, attorney speech in an official capacity carries unequaled political concern because it is a direct appeal to a branch of government with the power to apply, alter, or even create laws and policies that govern society. Second, attorney speech flows outside the courtroom to influence public debate of legal and social issues, especially given the media's increasing ability to bring attorney speech to the forefront of the public marketplace of ideas.[8] Therefore, the burden on attorney speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the provision was enacted to serve.

Simply stated, the challenged discipline provisions lack the precision that the First Amendment requires when a statute regulates the content of attorney speech directed toward the redress of client grievances both inside and outside the courtroom. The result is that in order to accomplish the worthy goals of "protection of the public, the preservation of confidence

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[8] Liam Braber, *Self-Government Before the Judiciary and a First Amendment Standard that Protects the Content of Courtroom Argument*, 3 First Amend. L. Rev. 253 (2005).

in the legal profession, and the maintenance of the highest possible professional standard for attorneys," *Jackson v. State Bar*, 23 Cal.3d 509, 514 (1979), the challenged discipline provisions effectively suppress a large amount of attorney speech involving "opinion" or "belief". The effect has been a reign of terror in California where attorneys are routinely forced to suppress their beliefs and opinions out of fear of suspension or disbarment.

If attorney speech thus implicates the First Amendment's core protection of political opinions and beliefs, what standards *should* apply as against the challenged California discipline provisions? Traditionally, courts subject content-based restrictions on speech to strict scrutiny. Strict scrutiny requires the regulation of speech to be (1) narrowly tailored to promote (2) a compelling government interest. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). However, since the challenged discipline provisions constitute attorney ethical regulation, they are subject to a lesser standard, the "likelihood of material prejudice." *Gentile*, 501 U.S. at 1075. Under either standard, however, the legislature is charged with drafting a statute that reaches only attorney speech that would otherwise have a seriously detrimental effect on the right to a fair trial. *Gentile*, 501 U.S. at 1074.[9] Otherwise, the terms of the challenged discipline provisions have so many different possible meanings that the suppression of permissible speech is augmented by statutory language so vague

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[9] For example, in order to pass constitutional muster, section 6068(c) should read "It is the duty of an attorney ... to counsel or maintain such actions, proceedings or defenses that *do not have a seriously detrimental effect on the right to a fair trial.*" Id.

and fraught with ambiguity that a person of ordinary intelligence has no idea what speech is permissible.[10]

In short, there is nothing narrow or less restrictive about the terms of the challenged discipline provisions, and they are over broad indeed when applied to discipline attorneys with suspension or disbarment for speech that poses no threat to the right of a fair trial and results in substantial monetary sanctions payable to the State Bar by the disciplined attorney.[11]

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[10] "A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited. Thus, the Fifth Amendment due process clause requires a statute to be sufficiently clear so as not to cause persons "of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application[.]" *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Laws that are insufficiently clear are void for three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

[11] Petitioner alleged that "[A]s administered, the Bar discipline system has a systemic pecuniary bias.... and substantial pecuniary interest in the outcome of disciplinary proceedings," and "a systemic bias stemming directly from the financial benefit resulting from attorney discipline." **ER at 39.** Petitioner pointed to Cal Bar Rules, Procedure, Div I, R 1013, subd. (e), providing that the presiding judge of the Bar Court, Chief Judge Stovitz, "shall: ... (e) Represent the State Bar Court in the State Bar budgetary process." *Id.* The California State Auditor, Bureau of State Audits, Summary of Report, 2003, recommended the State Bar: "Seek a legislative amendment that will strengthen (the Bar's) enforcement ability to collect costs for discipline and client security." **ER at 71:4-16;:16-98:19.** Combining the State Auditor's recommendation with the responsibility of the Chief Judge of the Bar Court to go to the legislature and argue on behalf

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO DECIDE AN IMPORTANT FIRST AMENDMENT ISSUE INVOLVING THE DISCIPLINE OF ATTORNEY SPEECH.

In *Canatella II*, an unpublished memorandum, the Ninth Circuit applied a heightened pleading standard to Petitioner's First Amendment challenge to California discipline regulations that directly conflicted with a prior published opinion of that Court in *Canatella I*. In the subject amended complaint, Petitioner alleged:

> "Plaintiff has for over ten (10) years been subject to threatened and ongoing discipline arising from litigation activity. Plaintiff is an attorney who frequently represents the rights of socially and economically disadvantaged persons before the Courts of the State of California and the Northern District, among others. As such, Plaintiff frequently takes positions in courtroom advocacy that are (perceived) not consistent with those espoused by mainstream attorneys, or their clients, who are adverse to the claims of Plaintiff's clients. Plaintiff has, in the past, been subject to disciplinary proceedings by the State Bar instituted as a result of complaints from his clients' adversaries relating to his advocacy on behalf of his clients. Because of the action by the Bar, and the clear threat of further such actions if Plaintiff continues to strenuously advocate his

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of the Bar's budgetary requirements establishes an institutional stake in raising funds from the discipline system.

> clients' rights, in the courtroom, Plaintiff has the legitimate fear that should he fulfill his obligation to clients to espouse positions unpopular with mainstream attorneys and their clients, that he will be subjected to further State Bar discipline. This fear acts to improperly constrain Plaintiff, and in this action he seeks remedies that will act to free him from this fear.....

ER 30.[12] Notwithstanding the foregoing allegations, the Court of Appeal affirmed the district court's dismissal of Petitioner's second amended complaint under Federal Rule of Civil Procedure 12(b)(6) and denied leave to amend.[13]

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[12] Petitioner will cite to "Excerpts of Record" ["ER"] in *Canatella v. Stovitz*, 2006 U.S. App. LEXIS 29985 (9th Cir. Cal. Dec. 6, 2006) (*Canatella II*) by the page.

[13] *See Canatella II*: "First, Appellant does not allege any facts supporting an as-applied challenge, and therefore, his as-applied arguments fail. Second, Appellant's assertion that those provisions are overbroad fails because he does not identify any protected speech that is encumbered by those provisions; put differently, Appellant alleges no facts from which we could conclude that those provisions "punish[] a `substantial' amount of protected free speech, `judged in relation to [their] plainly legitimate sweep," as required to "apply[] the `strong medicine' of overbreadth invalidation." *Citations*. Third, Appellant's vagueness challenges fail because he does not allege any facts from which we could conclude that the various terms he attacks are anything other than "terms of common understanding." *Citations*. Fourth, Appellant has failed to allege facts indicating that the challenged provisions discriminate on the basis of viewpoint. *Citations*. Fifth, Appellant's assertion that the challenged provisions are underinclusive fails because he has not alleged that those provisions contain viewpoint based exemptions. *Citations*. And sixth, Appellant's Petition Clause argument fails because the challenged provisions do not

Canatella II's application of a heightened pleading standard to the subject civil rights complaint is both contrary to Fed.R.Civ.P rule 8 and the pleading liberality mandated by *Conley v. Gibson*, 355 U.S. 41 (1957).[14] But *Canatella II* also created a conflict with an earlier published opinion *sub. nom.*, *Canatella v. California*, 304 F.3d 843 (9th Cir. 2002) (*Canatella I*) on the same important First Amendment issue involving the same Calfifornia discipline provisions.

In *Canatella I* the court concluded that "Because the equitable relief (Canatella) seeks would alleviate the (harmful chilling effect of the challenged discipline provisions) alleged, Canatella demonstrates standing and his claims should be allowed to proceed." *Canatella I* at 853. The result of the holding in *Canatella II* was to create an intra-circuit conflict on an important First Amendment issue that remains unresolved. This Court has previously expressed its concern with unresolved intra-circuit conflicts in the Ninth Circuit. Indeed, Circuit Judge Diarmuid F. O'Scannlain has echoed that

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violate any "associational or speech interests" alleged by the Appellant. *Citations. Canatella II* at *3-4 (outside quotes omitted).

[14] There is a strong presumption against dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "The issue is not whether a plaintiff will ultimately prevail but whether [he or she] is entitled to offer evidence in support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

concern by admonishing his brethren to resolve such conflicts by *en banc* review, even as Petitioner timely requested in this case.[15]

Canatella I should have been followed in *Canatella II*. The *Canatella I* court was careful to limit its holding to the procedural issue of standing, however, even though the standing issue arguably subsumed the question whether a claim for relief was stated.[16]

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[15] *See* Diarmuid F. O'Scannlain, *Should the Ninth Circuit Be Saved?*, 15 J. L. & Politics 415, 419-20 (1999): Consistent with the (White) Commission's view, several Justices of the Supreme Court have pointed out that the Ninth Circuit has failed to hear cases en banc frequently enough to settle intra-circuit conflicts or to correct wrongly decided opinions. In a letter to the White Commission, Justice Sandra Day O'Connor, the Circuit Justice for the Ninth Circuit, stressed the failures of our current limited en banc system, noting poignantly that, in the twelve months ending September 30, 1997, the Ninth Circuit resolved only eight out of 4,841 cases en banc. (footnote omitted). By contrast, the Supreme Court granted hearings on 25 cases from the Ninth Circuit and summarily decided 20 more during that same time period. Justice Anthony Kennedy echoed Justice O'Connor's concerns, stating in no uncertain terms: "It is quite apparent ... that the Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions of 'exceptional importance.' Uncertainty and lack of cohesion in the law are antithetical to the ends of our judicial system." (Footnote omitted.) Several recent Supreme Court 9-0 reversals of our 11-judge en banc decisions raise further doubt about the long-term viability of our limited en banc system. (Footnote omitted.)

Id. (outside quotes omitted).

[16] *See Canatella I* at 855, n. 16: "Because we conclude that Canatella's complaint should not have been dismissed on any of the foregoing grounds, we do not reach the question of whether the district court abused its discretion in denying him leave to amend his complaint. Nor do we express any view as to the merits of Canatella's claims, the questions before us being strictly

Indeed, *Canatella I* expressly stated "there is no better time to entertain Canatella's claims than now," *id.* at 855. The clear implication is that the allegations were sufficient to state a claim for relief.

Canatella I specifically applied the relevant pleading standard for the review of civil rights claims under rule 12(b)(6): "To establish 'a dispute susceptible to resolution by a federal court,' plaintiffs must allege that they have been 'threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.'" *Canatella I* at 855, *quoting Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617 (9th Cir. 1999) (quoting *Babbitt* [v. *United Farm Workers Nat'l Union*, 442 U.S. 289], 298-99). *Canatella I* concluded that "While Canatella is not currently involved in disciplinary proceedings, it cannot be said that Canatella's fear of facing future disciplinary proceedings is "imaginative and wholly speculative." *Babbitt*, 442 U.S. at 289." *Canatella I* at 855.

Notwithstanding that conclusion, *Canatella II* found allegations of overbreadth insufficient because: "[Canatella] does not allege that he is presently subject to any disciplinary proceedings pursuant to any of the challenged state laws, let alone disciplinary proceedings that may relate to his speech as an attorney." *Canatella II* at *13. Thus, *Canatella II* not only overlooked *Canatella I*, it also overlooked *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), flatly rejecting

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jurisdictional." *But see* 13 Wright, Miller, Cooper & Freer, *Federal Practice and Procedure* §§ 3531.1, at 813 n. 13 (2d ed. Supp. 2005) noting the occasional "confusion of merits and standing." Id.

the lower court's common law rule requiring heightened pleading requirements for civil rights claims. It further overlooked *Foman v. Davis*, 371 U.S. 178 (1962) reinstating a case due to the trial court's refusal to permit an amended complaint and broadly reading the standard for amending complaints under Fed. R. Civ. P. 15.

Moreover, the statement that "Appellant alleges no facts from which we could conclude that [the challenged discipline statutes] "punish[] a `substantial' amount of protected free speech,"*Canatella II* at *4, was simply wrong. Indeed, *Canatella I* concluded that "***[B]ecause the equitable relief [Appellant] seeks would alleviate the harm he has alleged, Canatella demonstrates standing and his claims should be allowed to proceed.***" And "***[W]e cannot selectively read the facial overbreadth claim out of Canatella's complaint, and on that basis, reduce the scope of Canatella's alleged harms for purposes of standing analysis.***" *Canatella I* at 853 (emphasis added).

> *Canatella I* explained that:
>
> The *alleged* source of the harms that Canatella and others like him may face is the arguably vague and overbroad language of the challenged provisions under which California lawyers perform their jobs and are subject to discipline. ... ***He alleges concrete and particularized harms to his First Amendment rights and demonstrates a sufficient likelihood that he and others may face similar harm in the future.*** Under the rubric of *Broadrick*, this is enough to satisfy the prudential requirements of

> standing for a First Amendment overbreadth claim.

Canatella I at 853 (emphasis added).

In conclusion, it cannot reasonably be disputed that *Canatella I* concluded Petitioner sufficiently alleged a first amendment overbreadth claim:

> ***Canatella alleges harm not only in the form of potential disciplinary measures under the challenged statutes, but in the ongoing harm to the expressive rights of California attorneys to the extent they refrain from what he believes to be constitutionally protected activity.*** *We also believe that Canatella's claims do not arise in a factual vacuum and are sufficiently framed to render them fit for judicial decision.*

Canatella I at 854 (emphasis added). The panel's conclusion that allegations of overbreadth were insufficient thus highlights the absence of standards for reviewing challenges to discipline regulations affecting attorney speech, but also directly conflicts with *Canatella I* and should have been resolved by en banc rehearing.

III. *CANATELLA II* CANNOT WITHSTAND THE FORCE OF THIS COURT'S SPEECH PRECEDENTS.

Canatella II summarily dismissed Petitioner's overbreadth claim:

> Appellant's assertion that those provisions are overbroad fails because he does not identify any protected speech that is encumbered by those provisions; put differently, Appellant alleges no facts from which we could conclude that those provisions "punish[] a `substantial' amount of protected free speech, `judged in relation to [their] plainly legitimate sweep," as required to "apply[] the `strong medicine' of overbreadth invalidation. *Virginia v. Hicks*, 539 U.S. 113, 118-120 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)).

Canatella II at *4. However, in order to arrive at that abbreviated overbreadth analysis, *Canatella II* impliedly rejected this Court's applicable speech precedents.

For example, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 874 (1997), stated, in reference to the unconstitutionality of the Federal Communications Decency Act, that

> "Regardless of whether the CDA is so vague that it violates the Fifth Amendment, *the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes*. For instance, its use of the undefined terms `indecent' and `patently offensive' will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content based regulation, *see, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, coupled with its increased deterrent effect as a (quasi) criminal

> statute, see, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, raise special First Amendment concerns because of its obvious *chilling effect* on free speech. The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech."

Id. outside quotes omitted and emphasis added. This case is controlled by the foregoing precedents because it presents an analogous situation in quasi-criminal Bar discipline proceedings.

As mentioned, the statutory terms (*i.e.*, "legal or just", "corrupt motive of passion or interest", "moral turpitude", "good faith", "probable cause", "warranted under existing law") suggest that the speech must be pre-approved by the State Bar, thereby implicating the ban on prior restraints.[17] *See* part I, *infra*. The vagueness of the foregoing terms present a classic

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[17] For more than a century, California attorneys have been disciplined for the "commission of any act involving moral turpitude." The State Bar has done this without any statutory definition of what constitutes an act of "moral turpitude." The California legislature has thus left the power to define "any act involving moral turpitude" to the California State Bar. The Bar has not been able to define with clarity what "any act involving moral turpitude" means. This lack of clarity may leave California attorneys without notice and at the mercy of State Bar employees as to whether they should be disciplined for "any act involving moral turpitude". Although this Court in *Jordan v. De George*, 341 U.S. 223 (1951) held that the definition of "crimes involving moral turpitude" was not unconstitutionally vague, the definition is vague enough to warrant a redefinition by the California legislature. The State Bar Courts' inability to explicitly define "any act involving moral turpitude," a ground for suspension and disbarment that the Bar uses more than any other, supports the need for definition of "any act involving moral turpitude."

example of an unconstitutional prior restraint on attorney speech. Because any "prior restraint" of speech is the "least tolerable" restriction of speech, this Court initially required a "clear and present danger" to the judicial process before restricting extra-judicial attorney speech. *Neb. Press Assoc. v. Stuart*, 427 U.S. 539 (1976). Later, however, the Court applied what to some observers appeared to be a much more lenient standard, even for prior restraints, with only a "substantial likelihood" of prejudice needed. But the latter standard is nothing less than the compelling state interest standard.

In *Gentile*, this Court taught that restrictions on attorney speech are impermissible unless there is a direct collision between the First and Sixth Amendment right to a fair trial, namely, that the speech of the attorney materially prejudices the right to a fair trial. The Court thus established the controlling First Amendment standard of review for state restrictions on an attorney's extrajudicial comments about a pending case. However, this case goes beyond *Gentile* in that it involves a challenge to California discipline restrictions on attorney speech both inside and outside *pending* cases. Although *Canatella II* does not mention *Gentile*, the district court fully appreciated the distinction. *Stovitz*, 365 F. Supp. 2d at 1072 n. 6 ("...The speech at issue in this case, however, is not limited to that (as in *Gentile*) made while a case is pending. For example, California Business & Professions Code section 6068(g) prohibits attorneys from encouraging the 'commencement' of an action from any corrupt motive of passion or interest."). Id.

Gentile declined to adopt the speech-protective "clear and present danger" of actual prejudice standard,

which gives the press greater freedom in their coverage of judicial proceedings, and a corresponding reduction of First Amendment protection for attorney comments about a pending case. *Gentile* at 1074.[18] In the first of two five-to-four majority opinions, the Court ruled that states may regulate attorney speech under the "substantial likelihood of material prejudice" standard. *Gentile* at 1075 (Rehnquist, C.J.). However, in a second five-to-four opinion, the Court decided that Rule 177 was void for vagueness, as applied to petitioner Gentile, because its safe harbor provision had misled him into believing that it protected his statements. *Gentile* at 1048 (Kennedy, J.)

Notwithstanding that the Court rejected the "clear and present danger standard," there is consensus (at least from the Rhenquist majority in part I) that the "substantial likelihood of material prejudice" formulation closely approximates the "clear and present danger" test:

> The drafters of Model Rule 3.6 apparently thought *the substantial likelihood of material prejudice formulation approximated the clear and present danger test. Citations.* [¶] *The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common*

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[18] *See Bridges v. California*, 314 U.S. 252, 263 (1941) ("The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

> *formulation of substantial likelihood of material prejudice could prove mere semantics.* Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application. Under those principles, nothing inherent in Nevada's formulation fails First Amendment review; but as this case demonstrates, Rule 177 has not been interpreted in conformance with those principles by the Nevada Supreme Court.

Gentile at 1037, emphasis added.

In light of the linguistic equivalency of both tests, a review of *Canatella II* shows that Court reviewed the overbreadth issue without applying any standard. *Canatella II* at *3 ("Regardless of the test used to determine the validity of those [California statutory] provisions and assuming they implicate some protected speech, Appellant's first prayer for relief still fails because he has not stated a claim upon which relief can be granted").

Paradoxically, even the district court applied a "balancing" test to the overbreadth issue:

> The standard ultimately adopted by the *Gentile* court is the one the Bar Defendants suggest in their reply: whether the speech targeted by the challenged provisions poses a "strong likelihood of material prejudice" to the integrity and fairness of the judicial system. (Citations.) *Gentile*, however, was decided in the context of *pending* cases, the speech relating to which can cause particular problems to the fair administration of the justice system. ... The Court noted that the "strong likelihood of

> material prejudice" standard constituted "a constitutionally permissible balance between the First Amendment rights of attorneys in *pending* cases and the State's interest in fair trials." (Citations). The speech at issue in this case, however, is not limited to that made while a case is pending. For example, California Business & Professions Code section 6068(g) prohibits attorneys from encouraging the "commencement" of an action from any corrupt motive of passion or interest. *Therefore, the Court will use the balancing test for out-of-court attorney speech set forth in the text above.*

Stovitz, 365 F. Supp. 2d at 1072 n. 6 (emphasis added). The history of this case thus highlights the "doctrinal incoherence" mentioned in Wendel. *See note 5, infra.*

As mentioned, *Reno* bears directly on the question whether *Canatella II* decided an important First Amendment question in a way that conflicts with relevant decisions of this Court. *Reno*, 521 U. S. at 870-872, 878. Like the California discipline restrictions at issue here, the Internet pornography statute in *Reno* contained few standards and applied to the public at large. This Court was particularly troubled by the statute's failure to define "indecent" and "patently offensive," because of the chilling effect the statute would have on serious discussions about such topics as birth control or homosexuality. 521 U.S. at 871. The problem was exacerbated, the Court said, by the fact that the statute carried criminal penalties. *Id.* at 871-72. The same situation is presented here where attorney discipline proceedings are "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 550 (1968).

The requirement that an attorney's speech be legal and just (section 6068 (c)), not be corruptly motivated by an attorney's passion or interest (section 6068 (g)), not be speech of moral turpitude, be based only on probable cause and warranted under existing law (section 6106 and Rule 3-200), and comply with good faith orders but not bad faith ones (section 6103), lies at the heart of overbreadth doctrine. Indeed, these discipline provisions deny to California attorneys fair notice of what speech she may speak and what speech she is prohibited from speaking, with a resulting chill on all attorney speech. Such content-based restrictions on speech should not be allowed to stand.

Attorneys should not lose a license to practice for speech involving no compelling state interest and no narrowly drafted discipline statute. *In re Ruffalo* (1968) 390 U.S. 544, 550-551, concluded that "where administrative proceedings contemplate the deprivation of a license to practice one's profession they are adversary proceedings of a *quasi-criminal* nature and procedural due process must be afforded the licensee." Id. Whether a license is a privilege or a right is not the issue. *It is the right to speak that is the issue.* And that right may not be abridged when the California discipline statutes are not narrowly drafted to aim at high standards of professional conduct, or conduct adversely impacting, for example, the right to a fair trial. In other words, the discipline provisions have no compelling state interest to support them. Therefore, *Canatella II* cannot stand the force of this Court's speech precedents.

IV. *CANATELLA II's* CONCLUSIONS REGARDING A PERCEIVED INSUFFICIENCY OF PETITIONER'S VAGUENESS ALLEGATIONS HIGHLIGHT THE NEED FOR APPLICABLE STANDARDS.

Petitioner alleged in the complaint at bar that "The subject bar statutes and rules are facially overboard and void for vagueness, ... *U.S. v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996)." **ER at 31.** However, *Canatella II* concluded:

> ... Appellant's vagueness challenges fail because he does not allege any facts from which we could conclude that the various terms he attacks are anything other than "terms of common understanding." *(Citations).*

Slip op. at 3-4. That conclusion directly conflicts with *Gentile* and highlights the mischief caused by the absence of applicable standards for measuring constitutionally protected attorney speech.

Just as "Rule 177(3) misled [Gentile] into thinking that he could give his press conference without fear of discipline," *Gentile* at 1048, Petitioner believed in good faith that all his historical litigation positions were "*legal*" and "*just.*" Indeed, Petitioner was actually misled by the language "*as appear to him or her*" into believing he could petition the court on behalf of clients without fear of discipline.[19] If Appellant was wrong, the

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[19] *See Gentile, supra*, 501 U.S. at 1048 ("for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline").

"*legal or just*" standard inevitably imports a heavy potential for distinguishing favored from disfavored speech on the basis of the ideas or views expressed.

Also, *Canatella II*'s conclusions regarding vagueness directly conflict with *Canatella I*:

> Canatella claims that the vagueness and overbreadth of the statutes result in censorship of protected speech by all California attorneys who push the envelope of zealous advocacy. ... *It is enough that Canatella shows that he and others in his position face a credible threat of discipline under the challenged statutes, and may consequently forego their expressive rights under the First Amendment.* Nor have we reason to doubt that other California attorneys find themselves in Canatella's dilemma. ***The alleged source of the harms that Canatella and others like him may face is the arguably vague and overbroad language of the challenged provisions under which California lawyers perform their jobs and are subject to discipline. ... He alleges concrete and particularized harms to his First Amendment rights and demonstrates a sufficient likelihood that he and others may face similar harm in the future. Under the rubric of Broadrick, this is enough to satisfy the prudential requirements of standing for a First Amendment overbreadth claim.***

Canatella I at 854 (emphasis added). From the foregoing, it is apparent that *Canatella II* conflicts both with the conclusions reached in *Gentile* as well as *Canatella I* regarding vagueness allegations of the

complaint.[20] Finally, it highlights the need for standards of judicial review applicable to the speech of attorneys acting in their official capacities as against over broad and vague attorney discipline provisions.

CONCLUSION

Each of the challenged provisions makes a political state of mind the punishable act. The statutory focus is on the attorney's thoughts about "legal or just", "corrupt motive of passion or interest", "moral turpitude, dishonesty or corruption", "good faith", "probable cause", "warranted under existing law"! What *is* actually being regulated and punished is not an act but thoughts about the redress of client grievances expressed by an attorney acting in her official capacity, often in a courtroom the most effective forum for political expression aimed at redress.

The challenged discipline provisions lack the precision that the First Amendment requires when a statute regulates the content of attorney speech in an official capacity inside and outside the courtroom. In

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[20] "A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited. Thus, the Fifth Amendment due process clause requires a statute to be sufficiently clear so as not to cause persons "of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application[.]" *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Laws that are insufficiently clear are void for three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

order to protect the courts and the public, the challenged discipline provisions effectively suppress a large amount of politically important attorney speech.

As to what standards should apply, *Gentile* charges the legislature with drafting discipline provisions that reach only attorney speech that would otherwise have a seriously detrimental effect on the right to a fair trial. Otherwise, the terms are susceptible of so many different possible meanings, and language so vague and fraught with ambiguity, that a person of ordinary intelligence has no idea what speech is permissible. In short, there is nothing narrow or less restrictive about the terms of the challenged California discipline provisions for they include attorney speech that poses no threat to anyone of anything. For the foregoing reasons the Writ should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 05-15447

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD A. CANATELLA,

Plaintiff - Appellant,

v.

RONALD W. STOVITZ, Presiding Judge of the State Bar Court, San Francisco; JUDITH A. EPSTEIN, Review Judge, San Francisco; MADGE S. WATAI, Review Judge, Los Angeles; RICHARD A. HONN, Hearing Judge, Los Angeles; PATRICE E. MCELROY, Hearing Judge, San Francisco; ALBAN I. NILES, Hearing Judge, Los Angeles; JOANN M. REMKE, Hearing Judge, San Francisco; ROBERT M. TALCOTT, Supervising Hearing Judge, Los Angeles; JAMES E. HERMAN, President of the Board of Governors of the State Bar of California; MICHAEL NISPEROS, JR., Chief Trial Counsel; RICHARD A. PLATEL, Hearing Judge, Los Angeles; JOHN VAN DE KAMP, President of the Board of Governors of the State Bar of California; RUSSELL MICHAEL NISPEROS, JR., Chief Trial Counsel,

Defendants - Appellees.

October 16, 2006, Argued and Submitted, San Francisco, California

December 6, 2006, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For RICHARD A. CANATELLA, Plaintiff - Appellant: Ronald M. Toran, Esq., COTTER & DEL CARLO, San Francisco, CA.

For RICHARD A. CANATELLA, Plaintiff - Appellant, Pro se, COTTER & DEL CARLO, San Francisco, CA.

For RONALD W. STOVITZ, PRESIDING JUDGE OF THE STATE BAR COURT, SAN FRANCISCO, JUDITH A. EPSTEIN, REVIEW JUDGE, SAN FRANCISCO, MADGE S. WATAI, REVIEW JUDGE, LOS ANGELES, RICHARD A. HONN, HEARING JUDGE, LOS ANGELES, PATRICE E. MCELROY, HEARING JUDGE, SAN FRANCISCO, JOANN M. REMKE, Hearing Judge, SAN FRANCISCO, ROBERT M. TALCOTT, SUPERVISING HEARING JUDGE, LOS ANGELES, RICHARD A. PLATEL, HEARING JUDGE, LOS ANGELES, JOHN VAN DE KAMP, PRESIDENT OF THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, RUSSELL MICHAEL NISPEROS, JR., CHIEF TRIAL COUNSEL, Defendant - Appellees: Marie M. Moffat, Esq., Jay M. Goldman, Esq., Office of the General Counsel, San Francisco, CA; Robin B. Johansen, Esq.,

REMCHO, JOHANSEN AND PURCELL, San Leandro, CA.

JUDGES: Before: WALLACE and BYBEE, Circuit Judges, and PREGERSON***, District Judge.

OPINION: MEMORANDUM *

Before: WALLACE and BYBEE, Circuit Judges, and PREGERSON***, District Judge.

Appellant Richard Canatella ("Appellant") appeals the dismissal for failure to state a claim of his 42 U.S.C. § 1983 suit against several officers of the State Bar of California alleging that: 1) five California attorney disciplinary provisions are unconstitutional, 2) the Bar's disciplinary procedures violate due process and the Supremacy Clause, and 3) the Bar has deprived him of the protection of California's litigation privilege. The facts and procedural history are familiar to the parties, and we do not repeat them here. Dismissals for failure to state a claim are reviewed de novo. *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996).

Appellant's first claim challenges CAL. Bus. & PROF. CODE § 6068(c), CAL. Bus. & PROF. CODE § 6068(g), CAL. Bus. & PROF. CODE § 6103, CAL. Bus. & PROF. CODE § 6106, and CAL. R. OF PROF. CONDUCT 3-200. Regardless of the test used to determine the validity of those provisions and assuming they implicate some protected speech, Appellant's first prayer for relief still fails because he has not stated a claim upon which relief can be granted. First, Appellant does not allege any facts supporting an as-applied challenge, and therefore, his as-applied arguments fail.

Second, Appellant's assertion that those provisions are overbroad fails because he does not identify any protected speech that is encumbered by those provisions; put differently, Appellant alleges no facts from which we could conclude that those provisions "punish[] a 'substantial' amount of protected free speech, 'judged in relation to [their] plainly legitimate sweep," as required to "apply[] the 'strong medicine' of overbreadth invalidation." *Virginia v. Hicks*, 539 U.S. 113, 118-120, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). Third, Appellant's vagueness challenges fail because he does not allege any facts from which we could conclude that the various terms he attacks are anything other than "terms of common understanding." *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001); *see also CSC v. Letter Carriers*, 413 U.S. 548, 578-79, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973) (noting that "there are limitations in the English language with respect to being both specific and manageably brief, and it seems . . . that although [a] prohibition[] may not satisfy those intent on finding fault at any cost," a prohibition is not vague if it is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with"). Fourth, Appellant has failed to allege facts indicating that the challenged provisions discriminate on the basis of viewpoint. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 736, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality). Fifth, Appellant's assertion that the challenged provisions are underinclusive fails because he has not alleged that those provisions contain viewpoint based exemptions. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S. Ct. 2038, 129 L. Ed. 2d 36

(1994) (holding that to be unconstitutionally underinclusive, a regulation must create "an exemption from an otherwise permissible regulation of speech"). And sixth, Appellant's Petition Clause argument fails because the challenged provisions do not violate any "associational or speech interests" alleged by the Appellant. *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999) (en banc); *see also McDonald v. Smith*, 472 U.S. 479, 485, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985).

Appellant has also failed to state a claim upon which relief may be granted in his second prayer for relief. By failing to raise the argument in his briefs, Appellant has waived his Supremacy Clause argument. *See, e.g., Armentero v. I.N.S.*, 412 F.3d 1088, 1095 (9th Cir. 2005) ("Failure to raise an argument in an opening brief constitutes waiver."). Appellant's alternative argument, that California's disciplinary system violates due process, is foreclosed by H*irsh v. Justices of Supreme Court of State of California*, 67 F.3d 708, 714 (9th Cir. 1995).

Appellant's third claim--that subjecting him to discipline despite California's litigation privilege deprives him of right or privilege under color of state law--fails to state a claim upon which relief can be granted because that privilege does not apply to disciplinary proceedings. *See, e.g., Silberg v. Anderson*, 50 Cal. 3d 205, 213, 266 Cal. Rptr. 638, 786 P.2d 365 (Cal. 1990) (noting that the litigation privilege is designed "to afford litigants . . . the utmost freedom of access to the courts without fear of being harassed subsequently *by derivative tort actions*" (citation omitted) (emphasis added)); *Kuehn v. Kuehn*, 85 Cal. App. 4th 824, 834, 102

Cal. Rptr. 2d 743 (Cal. Ct. App. 2000) (noting that the "litigation privilege . . . bars derivative tort actions").

Finally, because "it is clear, upon *de novo* review, that [Appellant's] complaint [cannot] be saved by any amendment," *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004), the district court did not abuse its discretion by dismissing his complaint without leave to amend. *See also McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003).

Accordingly, the district court's order dismissing Appellant's claims is AFFIRMED.

CONCUR BY: WALLACE (In Part)

DISSENT BY: WALLACE (In Part)

DISSENT: WALLACE, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that Canatella has waived his Supremacy Clause argument. Because Canatella lacks constitutional standing to raise his other arguments, however, I would not address their merits. Rather, I would dismiss the appeal.

I

We are obligated to consider our jurisdiction before proceeding to the merits of the case. *See Bell v. Bonneville Power Admin.*, 340 F.3d 945, 950 (9th Cir. 2003), *citing Steel Co. v. Citizens for a Better Env't*, 523

U.S. 83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (rejecting the doctrine of hypothetical jurisdiction). For Canatella "to invoke the jurisdiction of the federal courts," he "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Thus, Canatella has the burden of establishing what we have referred to as "constitutional standing." *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1531 (9th Cir. 1985). To satisfy the requirements of constitutional standing, Canatella must allege, among other things, an "injury in fact" -- that is, "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotations omitted).

"But there is still more to standing requirements because, beyond constitutional standing, there are prudential standing principles to which 'the federal judiciary has also adhered.'" *Smelt v. County of Orange*, 447 F.3d 673, 682 (9th Cir. 2006), *quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). To establish prudential standing, Canatella "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge*, 454 U.S. at 474 (quotations omitted).

We previously addressed the issue of Canatella's standing in *Canatella v. State of California*, 304 F.3d 843 (9th Cir. 2002) (as amended) (*Canatella I*). There, we recited the standards pertinent to both constitutional and prudential standing. *See Canatella I*, 304 F.3d at 852. We went on to conclude that "[b]ecause the equitable relief [Canatella] seeks would alleviate the harm he has alleged, Canatella demonstrates standing and his claims should be allowed to proceed." *Id.* at 853.

At first glance, *Canatella I* appears to foreclose further consideration of Canatella's standing to raise his arguments on appeal. Nevertheless, I am convinced that in *Canatella I* we made the limited determination that Canatella had satisfied only "the prudential requirements of standing under the analysis appropriate in the First Amendment context." *Id.* at 855. *See also id.* at 853 n.11 (describing our standing analysis as "relaxed"); *id.* at 854 ("Under the rubric of *Broadrick [v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)], this is enough to satisfy the prudential requirements of standing for a First Amendment overbreadth claim"). Thus, we did not decide whether any of Canatella's arguments were supported by allegations meeting the requirements of constitutional standing.

In addition, *Canatella I* made its standing determination based on Canatella's disciplinary record, *see id.* at 852-53, but Canatella now indicates that this record is not the basis of the arguments he sets forth in his second amended complaint. *See* Transcript of Oral Argument, *Canatella v. Stovitz*, No. 05-15447, at 04:41-4:55 ("I think if the court is talking Article III standing,

we have something different here. We have a pure overbreadth case here. We have no fact case here."); *id.* at 14:11-14:16 ("That's why we can come into this court without a fact-based record"). *See also Canatella v. Stovitz*, 365 F. Supp. 2d 1064, at 1077 n.12 (N.D. Cal. 2005) ("As Canatella has made quite clear, 'this case is not about the historical record'"). Allegations concerning either Canatella's disciplinary record or his possible intent to repeat any of the acts for which he has been disciplined are therefore not before us. Accordingly, I have no basis for concluding, as *Canatella I* did, that "[t]here is a strong likelihood Canatella may again face discipline under the challenged provisions." 304 F.3d at 853.

Because we did not specifically address the issue, or, alternatively, because we did so in light of allegations that Canatella now indicates are irrelevant, *Canatella I* does not foreclose our consideration of constitutional standing. I would therefore address each of his arguments to determine whether any of them implicate the "invasion of a legally-protected interest" such that he may seek redress from this court.

A

Canatella argues that Cal. Bus. & Prof. Code § 6068(c), Cal. Bus. & Prof. Code § 6068(g), Cal. Bus. & Prof. Code § 6106, and Cal. R. of Prof. Conduct 3-200 (the challenged state laws) violate the First Amendment "as applied." "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (as amended). "An as-

applied challenge does not implicate the enforcement of the law against third parties," nor does it "render the law itself invalid but only the particular application of the law." *Id.*

In this case, Canatella alleges that the challenged state laws inhibit his ability both to "take[] positions in courtroom advocacy that are not consistent with those espoused by mainstream attorneys . . . or their clients" and to "strenuously advocate his clients' rights." He does not allege, however, what these "positions" are; how they may differ from those "espoused by [the] mainstream"; or why, and if so to what extent, such "strenuous[]" advocacy may differ from the advocacy other attorneys provide. Nor does Canatella allege that the challenged state laws have been or will ever be enforced against him merely because he may "take[] positions" outside the "mainstream" or because he "strenuously advocate[s] his clients' rights." Furthermore, he does not allege that he is presently subject to any disciplinary proceedings pursuant to any of the challenged state laws, let alone disciplinary proceedings that may relate to his speech as an attorney.

Indeed, the only possible harm he alleges is his "fear" of future discipline. He does not indicate with any particularity, however, *what* speech he fears may subject him to such discipline. Canatella, then, has failed to allege a "particular application" of the challenged state laws that results in a harm that is both "concrete and particularized" as well as "actual or imminent." He thus lacks constitutional standing to assert his First Amendment "as-applied" arguments.

B

Canatella contends that the challenged state laws "unconstitutionally chill[] . . . courtroom speech." Under the Supreme Court's First Amendment overbreadth doctrine, Canatella may challenge laws that by virtue of their overbreadth inhibit the First Amendment rights of individuals who are not before the court. *See 4805 Convoy v. City of San Diego*, 183 F.3d 1108, 1112 (9th Cir. 1999). He may do so "even if his own conduct is not protected under the First Amendment." *Id.* In this narrow context, then, Canatella may rely on another individual's "specific present objective harm or a threat of specific future harm" to circumvent "the prudential rule that a litigant has standing to vindicate only his own constitutional rights." *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984).

Nevertheless, "the overbreadth doctrine does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Dream Palace v. County of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004) (internal quotations omitted). *See also Table Bluff*, 256 F.3d at 886 (holding that the application of prudential standing principles "presuppose[s] that the plaintiff already has [constitutional] standing"). Here, Canatella fails to allege any particular speech act that may enmesh him in a disciplinary proceeding pursuant to the challenged state laws. Canatella, then, has failed to allege a pertinent harm that is both "concrete and particularized" as well as "actual or imminent." Accordingly, Canatella lacks constitutional standing to assert his First Amendment overbreadth arguments.

C

Canatella argues that the challenged state laws are unconstitutionally vague. To prove as much, Canatella would have to show (1) that they do not define the conduct they prohibit with sufficient definitiveness, and (2) that they do not establish minimal guidelines to govern law enforcement. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996). "Where a law at issue does not implicate First Amendment rights, it may be challenged for vagueness only as applied, unless the enactment is impermissibly vague in all of its applications." *Id.* (internal quotations and citation omitted).

Again, however, Canatella fails to allege that the challenged state laws either have been or will be enforced against him for engaging in any particular speech or conduct. As such, he fails to allege any harm that is both "concrete and particularized" as well as "actual or imminent" resulting from the enforcement of the allegedly vague laws. He therefore lacks constitutional standing to raise either facial or as-applied void-for-vagueness challenges to the laws.

D

Canatella contends that section 6068(c) is underinclusive in violation of the First Amendment because it fails to prohibit "many illegal or unjust lawsuits brought from corrupt motive." Similarly, Canatella contends that section 6068(g) is underinclusive "because many illegal or unjust lawsuits brought from corrupt motives fall outside the statute's limited scope."

For "a regulation of speech" to be "impermissibly underinclusive" and thereby conflict with "firmly grounded . . . First Amendment principles," the regulation must create "an exemption from an otherwise permissible regulation of speech" in an "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (internal quotations omitted).

Canatella fails to allege that he engages or imminently will engage in speech representing the views of one side of any particular "debatable public question," let alone speech that is in any way disadvantaged by the enforcement of either section 6068(c) or section 6068(g). Again, Canatella fails to allege an injury that is both "concrete and particularized" as well as "actual or imminent" resulting from the enforcement of the allegedly underinclusive laws. Canatella thus lacks constitutional standing to challenge the laws.

E

The First Amendment's Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const., amend. I. Canatella contends that section 6068(c) violates the Petition Clause by "[l]abeling [his] conduct 'vexatious,' 'reckless,' or frivolous.'" Canatella, however, has not alleged any particular conduct or speech that section 6068(c) "labels" in that way. Canatella further contends that section 6068(g) "appears to distinguish favored from disfavored court speech on the basis of the ideas or views expressed." Canatella, however, does not allege that he engages or will imminently engage in any

speech that section 6068(g) may favor or disfavor. Because Canatella has not alleged a concrete and particularized injury resulting from the enforcement of either section 6068(c) or section 6068(g), he lacks constitutional standing to challenge these laws on the ground that they are underinclusive in violation of the First Amendment.

F

Canatella argues that Cal. Bus. & Prof. Code § 6086.10 violates due process because the judges imposing disciplinary orders have a financial interest in the outcome of pending disciplinary proceedings. Section 6086.10 provides in part that "[a]ny order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs" and that "[i]n any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs." Cal. Bus. & Prof. Code § 6086.10(a). Because Canatella has not alleged that he is presently or will imminently be subject to an order to pay such costs, he has failed to establish an injury-in-fact on which he may base his constitutional standing to challenge section 6086.10.

G

Cal. Civ. Code § 47(b)(2) provides that "[a] privileged publication or broadcast is one made. . . [i]n any . . . judicial proceeding." Canatella argues that by potentially subjecting him to discipline based on an in-court statement, the California Bar may, under color of state law, deprive him of the privilege afforded by

section 47(b)(2) in violation of 42 U.S.C. § 1983. Again, Canatella fails to allege that he is presently or will imminently be disciplined based on any particular statement that may be privileged under section 47(b)(2). As such, his section 1983 challenge to the California Bar's disciplinary procedures is premised on a hypothetical injury, not an injury-in-fact. He therefore lacks constitutional standing to challenge those procedures.

In sum, I would determine that Canatella lacks constitutional standing to raise any of his arguments concerning either the challenged state laws or the California Bar's disciplinary procedures.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

No. C 00-01105 JSW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD A. CANATELLA, Plaintiff, v. RONALD W. STOVITZ, Presiding Judge of the State Bar Court, San Francisco; JUDITH A. EPSTEIN, Review Judge, San Francisco; MADGE S. WATAI, Review Judge, Los Angeles; RICHARD A. HONN, Hearing Judge, Los Angeles; PATRICE E. McELROY, Hearing Judge, San Francisco; ALBAN I. NILES, Hearing Judge, Los Angeles; JOANN M. REMKE, Hearing Judge, San Francisco; ROBERT M. TALCOTT, Supervising Hearing Judge, Los Angeles; JAMES E. HERMAN, President of the Board of Governors of the State Bar of California; MICHAEL NISPEROS, JR., Chief Trial Counsel, Defendants.

February 16, 2005, Decided

COUNSEL: For Richard A. Canatella, Plaintiff: Richard M. Toran, Richard A. Canatella, Cotter & Del Carlo, San Francisco, CA.

For Ronald Stovitz, Presiding Judge of the State Bar Court, San Francisco, Judith A. Epstein, Review Judge, San Francisco, Madge S. Watai, Review Judge, San Francisco, Richard A. Honn, Hearing Judge, Los Angeles, Patrice E. McElroy, Hearing Judge, San Francisco, Alban I. Niles, Hearing Judge, San Francisco, Joann M. Remke, Hearing Judge, San Francisco, Robert M. Talcott, Supervising Hearing Judge, San Francisco, James E. Herman, President of the Board of Governors of the State Bar of California,

Defendants: Robin Bradle Johansen, Kathleen J. Purcell, Remcho Johansen & Purcell, San Leandro, CA; Jay Michael Goldman, Lawrence C. Yee, Marie Mae Moffat, Office of General Counsel, State Bar of California, San Francisco, CA.

For Michael Nisperos, Jr., Chief Trial Counsel, Defendant: Robin Bradle Johansen, Kathleen J. Purcell, Remcho Johansen & Purcell, San Leandro, CA; Lawrence C. Yee, Marie Mae Moffat, Office of General Counsel, State Bar of California, San Francisco, CA; Tom Blake, State Attorney General's Office, San Francisco, CA.

For State Bar of California, 3rd party defendant: Jay Michael Goldman, Office of General Counsel, State Bar of California, San Francisco, CA.

JUDGES: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

OPINION BY: JEFFREY S. WHITE

OPINION:

ORDER RE BAR DEFENDANTS' MOTION TO DISMISS

Now before the Court are the motions of Defendants Ronald W. Stovitz, Judith A. Epstein, Madge S. Watai, Richard A. Honn, Patrice E. McElroy, Alban I. Niles, Joann M. Remke, Robert M. Talcott, James E. Herman and Michael Nisperos, Jr.'s (collectively "Bar Defendants") to dismiss Plaintiff Richard A. Canatella's ("Canatella") Second Amended Complaint ("SAC") for failure to state a claim upon

which relief can be granted pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* and to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(1)* for lack of standing.[1]

Having carefully reviewed the parties' papers and considered their arguments and relevant legal authority, and good cause appearing, the Court hereby DENIES the Bar Defendants' motion to dismiss for lack of standing and GRANTS the Bar Defendants' motion to dismiss pursuant to *Rule 12(b)(6)* with prejudice.

BACKGROUND FACTS AND PROCEDURAL HISTORY[2]

Canatella has practiced law in California since 1972. He is licensed to practice in California and the District of Columbia, and is a member of the bars of the Northern and Central districts of California, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States.

Prior to 1989, Canatella had no record of discipline before any court or bar. Between 1989 and 1996, federal and state courts imposed monetary sanctions against Canatella on twenty-six occasions, for a cumulative total of approximately $ 100,000. Canatella was sanctioned for such reasons as vexatious litigation, filing of frivolous actions and appeals, and the use of delay tactics. Twenty-five of the twenty-six sanctions arose in the context of two sets of proceedings. In the first, Canatella filed a series of civil actions on behalf of a babysitter and her parents, after appellate reversal of the babysitter's conviction for second degree murder and child abuse. In the second, Canatella represented two civil defendants in a series of collection actions. All

of the sanctions levied against Canatella concern his activities as an advocate of his clients' interests in judicial proceedings.

In 1992, the State Bar of California ("State Bar") initiated a disciplinary investigation into the multiple sanctions orders. In response, Canatella filed a *section 1983* action seeking to enjoin the State Bar from taking disciplinary action against him, and to declare facially unconstitutional several provisions of the California Business and Professions Code and one provision of the California Rules of Professional Conduct.[3] Canatella's case was originally assigned to the Honorable Martin J. Jenkins. While the sanctions orders themselves generally arose for violations of rules of court, such as *Federal Rule of Civil Procedure 11(b)*, or *Federal Rule of Appellate Procedure 38*, Canatella challenged the state bar statutes and professional rule under which he could ultimately be subject to discipline or disbarment by the State Bar. Judge Jenkins abstained from exercising jurisdiction under *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, and Canatella appealed to the United States Court of Appeals for the Ninth Circuit.

Pending appeal, the State Bar filed formal charges against Canatella. Canatella agreed to a stipulated settlement requiring thirty days' actual suspension from legal practice, and an eighteen-month stayed suspension subject to reinstatement of the charges upon any finding of rule violations during the eighteen-month suspension period. The California Supreme Court approved the stipulated discipline on August 19, 1999, in a final disciplinary order. In light of the settlement, the Ninth Circuit dismissed Canatella's appeal as moot on November 17, 1999. *See Canatella v.*

State Bar, 203 F.3d 830 (9th Cir. 1999). Judge Jenkins subsequently denied without prejudice Canatella's motions for vacatur of the abstention order, and for leave to amend his complaint.

In March of 2000, Canatella filed this second *section 1983* action, again seeking an injunction prohibiting the State Bar from taking further disciplinary action against him under the challenged provisions, and a declaration that the provisions were unconstitutional. Canatella's principal allegations were that facially and as applied, the challenged provisions are unconstitutionally vague and overbroad, in violation of the *First* and *Fourteenth Amendments.* In raising these claims, Canatella alleged a strong likelihood of further State Bar disciplinary charges for a sanction entered against him by a magistrate judge on January 14, 2000, in a separate action.[4]

Judge Jenkins dismissed Canatella's complaint pursuant to *Rooker-Feldman* and *Younger*, and on the additional grounds that Canatella lacked standing and that his claims were not ripe for review. Canatella appealed that order to the Ninth Circuit.[5]

The Ninth Circuit reversed, holding that Canatella's claim was not barred by the *Rooker-Feldman* or *Younger* doctrines from hearing his claim and that Canatella had sufficiently alleged harm to his rights under the *First Amendment* such that this Court could properly exercise jurisdiction over his claims. *Canatella, 304 F.3d at 843.* The Ninth Circuit held that Canatella's claims were sufficiently ripe to be heard, and remanded the case to this Court stating that "there is no better time to entertain Canatella's claims than now." *Id. at 855.*

Canatella filed his Second Amended Complaint on July 23, 2003. The Bar Defendants filed their motion to dismiss on August 8, 2003. Judge Martin J. Jenkins recused himself *sua sponte* on October 8, 2003. The matter was assigned to the undersigned and set for hearing on February 20, 2004. On January 16, 2004, Canatella filed a motion for an order to show cause why Defendants' counsel should not be disqualified for alleged violations of California Rule of Professional Conduct 3-310(C) and set the hearing on his motion to occur simultaneously on February 20, 2004 as well. On September 13, 2004, the Court denied Canatella's Motion for an Order to Show Cause Why Defendants' Counsel Should Not be Disqualified.

LEGAL STANDARD

A motion to dismiss pursuant to *Rule 12(b)(6)* tests the sufficiency of the complaint. *See North Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).* Dismissal of an action pursuant to *Rule 12(b)(6)* is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991).* In reviewing a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court must assume all factual allegations to be true and must construe them in the light most favorable to the nonmoving party. *North Star, 720 F.2d at 580.* The Court will dismiss the complaint or any claim in it without leave to amend if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. *Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).* Dismissal may also be without leave to amend where there has been repeated failure to cure the deficiencies by amendments previously

allowed. *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).*

ANALYSIS

A. *Canatella I*

A review of *Canatella I* is a natural starting point in evaluating Defendants' motion. As noted above, this Court dismissed Canatella's case based on the *Rooker-Feldman* and *Younger* doctrines, as well as on standing and ripeness grounds. The Ninth Circuit reviewed that decision and concluded that these were not proper grounds for dismissal. In deciding that Canatella had standing to bring the action, the Ninth Circuit stated the following:

> On the record before us, we believe not only that "the parties remain philosophically on a collision course," (citation omitted) but that there is a strong likelihood Canatella may again face discipline under the challenged provisions. His threat of future prosecution is not merely hypothetical and conjectural, but actual.

Canatella I, 304 F.3d at 853.

The Ninth Circuit was quite clear about the scope of its holding, noting that the questions it addressed were "strictly jurisdictional" and that it expressed no "view as to the merits of Canatella's claims." *Id. at 855 n.16.*

The instant motion, by contrast, requires the Court to reach the merits of Canatella's claims by determining whether, even if all facts alleged in his complaint are true, Canatella can state a claim as a matter of law. This

exercise is not rendered unnecessary by the Ninth Circuit's holding, as Canatella suggests. (*See* Opposition to Motion to Dismiss ("Opp.") at 13-14, 16-17.) While *Canatella I* recognized that Canatella had standing to bring his claims in federal court -- that is, that there was a "case or controversy" within the meaning of Article III of the United States Constitution -- it is the duty of this Court to decide whether Canatella's complaint states a claim upon which relief can be granted. *See Davis v. Passman, 442 U.S. 228, 239 n.18, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979)* (distinguishing between standing and stating a cause of action).

B. Attorney Speech

Canatella's complaint concerns the scope of an attorney's right to freely express himself through words or conduct, whether by arguing a motion in a courtroom, filing an action, or even making recommendations to others about whether and how to file actions and assert claims in court. The United States Supreme Court has held that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar, 501 U.S. 1030, 1071, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991).* In a non-public forum such as a courthouse, content-based restrictions on speech are permissible as long as they are reasonable in light of the purpose served by the forum and viewpoint neutral. *See Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 966 (9th Cir. 2002).* Even outside these contexts, the Supreme Court has observed that lawyers are not "protected by the *First Amendment* to the same extent as those engaged in other businesses." *Gentile, 501 U.S. at 1073.* The task

for a court in analyzing out-of-court attorney speech is to "engage[] in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's *First Amendment* interest in the kind of speech . . . at issue." *Id.*[6]

C. The Challenged Provisions[7]

1. Provisions Targeting Conduct: *California Business and Professions Code §§ 6103* and *6106*

The Supreme Court has entertained facial freedom of expression challenges only against statutes that, "by their terms," sought to regulate "spoken words" or patently "expressive or communicative conduct." *Broadrick v. Oklahoma, 413 U.S. 601, 612-13, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*; *see also Roulette v. City of Seattle, 97 F.3d 300, 305 (9th Cir. 1996)* ("a facial freedom of speech attack must fail unless, at a minimum, the challenged statute is directed narrowly and specifically at expression or conduct commonly associated with expression"). On its face, *California Business and Professions Code sections 6103* and *6106* simply do not directly regulate speech or expressive conduct. *Section 6103* is directed at ensuring that attorneys do not violate court orders (which is most often done without speaking or engaging in expressive activity), and that they do not violate their oath or other duties as an attorney. *Section 6106* is aimed at subjecting attorneys to discipline for a range of base behavior. While acts that would fall within the reach of these statutes *might* come in the form of speech or other expressive conduct, that is not enough to support a facial challenge. *Roulette, 97 F.3d at 303, 305 (9th Cir. 1996)* ("It is possible to find some kernel of expression in almost every activity a person undertakes -- for

example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the *First Amendment*") (*citing City of Dallas v. Stanglin, 490 U.S. 19, 25, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989)).* As a Court all too familiar with attorneys who have engaged in conduct that would fall within the confines of *sections 6103* and *6106*, the conduct proscribed by these provisions cannot be characterized as "integral to, or commonly associated with, expression." *Roulette, 97 F.3d at 304.*[8] As the Court demonstrates below, however, even if *sections 6103* and *6106* did target speech or expressive conduct, Canatella's facial attack against them fails.[9]

Before examining each statute, however, the Court notes that both of these provisions satisfy *Gentile's* balancing test. There is little doubt that the State's interest in these provisions outweighs whatever free speech rights attorneys may have in, *e.g.*, "corruption" or the willful violation of a court order. *Gentile, 501 U.S. at 1073.*

a. *California Business and Professions Code § 6103*

Section 6103 provides:

> A willful disobedience or violation of an order of the court requiring him to do an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

i. Overbreadth

The *First Amendment* doctrine of overbreadth is an exception to the normal rule regarding the standards for facial challenges. A showing that a law punishes a "substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks, 539 U.S. 113, 118-19, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003)* (citations omitted).

The overbreadth doctrine is regarded by the Supreme Court as "strong medicine" because it involves the facial invalidation of a law and because it permits individuals standing to raise the claims of others not before the Court. *Broadrick, 413 U.S. at 613.* For these reasons, the Court has said that it will avoid invalidating laws by allowing courts to construe statutes narrowly and thus avoid overbreadth. *Osborne v. Ohio, 495 U.S. 103, 120, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990).* Courts may also avoid the "strong medicine" of overbreadth by attempting to sever the unconstitutionally overbroad part of the law from the remainder of the statute. *See, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985).*[10]

Canatella alleges that *section 6103* is overbroad because it does not take into account an attorney's ability to pay fines levied by a court. He also contends that the provision "conflicts with the law of California making it perfectly lawful for an attorney to ignore an order of

the court if the attorney believes it unconstitutional." (SAC at ¶¶ 18-19, 22; *Zal v. Steppe, 968 F.2d 924, 929-30 (9th Cir. 1992)).* The word "willful," however, incorporates the notion of intentionality. *In re Hallinan, 43 Cal.2d 243, 251, 272 P.2d 768 (1954).* The California Supreme Court has held that during a Bar disciplinary proceeding, a member is provided an opportunity to show that he is truly unable to pay a sanction in order to avoid a sanction. *See, e.g., In re Broderick*, 3 Cal. State Bar Ct. Rptr. 138, 148-49, n.8 (Cal. Bar Ct. 1994); *In re Laden*, 4 Cal. State Bar Ct. Rptr. 678 (2004).

Plaintiff's claim that *§ 6103* conflicts with *Zal* is likewise rejected. *Section 6103* specifically states that attorneys may be disciplined for violating only court orders that an attorney "ought in good faith" to comply with. *Bus. & Prof Code § 6103.* This provision ensures that attorneys will not be disciplined for failing to comply with an unjust court order. The provision narrows the scope of the law, and hence, allows for an attorney to exercise his or her right to disobey a court order the attorney believes to be unconstitutional. *Zal, 968 F.2d at 929-30.* Canatella's overbreadth challenges to *section 6103* fail as a matter of law.

ii. Vagueness[11]

The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926).*

Unduly vague laws violate due process whether or not speech is regulated. *See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)*(declaring vagrancy law unconstitutional). Courts look with special scrutiny at allegedly vague laws that restrict speech. The Supreme Court has observed that freedom of speech is "delicate and vulnerable, as well as supremely precious in our society . . . [and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963)*. That is not to say, however, that a legislature must draft its laws with mathematical certainty. As the Ninth Circuit has noted, "perfect clarity is not required even when a law regulates protected speech." *Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001)*. Even when a law implicates *First Amendment* rights, "the Constitution must tolerate a certain amount of vagueness." *Id. at 1151*.

Canatella's vagueness challenge with respect to *§ 6103* centers on the word "willful." He alleges that the word is "totally subjective and vague." (SAC at ¶ 21.) The word "willful" is ubiquitous in the law and has the effect of protecting against liability for inadvertent or unintentional acts. In this way, the inclusion of "willful" can therefore actually can make a law *less* vague. *See United States v. Makowski, 120 F.3d 1078, 1080 (9th Cir. 1997)* ("a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)*. The proposition that the inclusion of the word "willful" in a statute renders a

law unconstitutionally vague is so novel that apparently there is no case standing for it. Certainly Canatella has cited the Court to none. This argument therefore cannot stand and the claim is dismissed.

b. *California Business and Professions Code § 6106*

Section 6106 provides:

> The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor, constitutes a cause for disbarment or suspension.

i. Overbreadth

Canatella contends that this provision is overbroad because the law "reach[es] a substantial amount of constitutionally protected conduct, namely, judicial or court speech. . . ." (SAC. ¶ 26.) *Section 6106*, however, is no "broader than necessary to protect the State's interests" and is consistent with a State's "right to require high standards of qualification, including good moral character." *Gentile, 501 U.S. at 1077*; *Schware v. Bd. of Bar Exam. of State of N. Mexico, 353 U.S. 232, 239, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957)* (citations omitted). The California Supreme Court has consistently stressed that in evaluating an attorney's conduct in disciplinary proceedings the "principal concern is always the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standard for attorneys." *Jackson v. State Bar, 23 Cal.3d 509, 514, 153 Cal. Rptr. 24, 591 P.2d 47 (1979)*. The

statute recognizes this concern and is limited to ensuring that attorneys who possess a license to practice law conform their conduct to the standards of professional conduct. *Connally, 269 U.S. at 391.* The wording of the statute does not suggest that its unconstitutional applications substantially exceed its constitutional applications. *New York v. Ferber, 458 U.S. 747, 770, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).* For this reason, Canatella's overbreadth challenge to *§ 6106* is rejected.

ii. Vagueness

Canatella's quarrel with *§ 6106* is that the terms "moral turpitude, dishonesty, or corruption" are "vague and incomprehensible." (SAC at ¶¶ 23, 24; Opp. at 32.) The Supreme Court has rejected the argument that the term "moral turpitude" is unduly vague. *Jordan v. De George, 341 U.S. 223, 231, 95 L. Ed. 886, 71 S. Ct. 703 (1951)* ("No case has been decided holding that the phrase ["moral turpitude"] is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process"). Neither is the word "dishonesty" unconstitutionally vague. *Wayne v. Bureau of Private Investigators & Adjusters, 201 Cal.App.2d 427, 440, 20 Cal. Rptr. 194 (1962)* ("It would be almost impossible to draft a statute which would specifically set forth every conceivable act which might be defined as being dishonest.") Finally, the word "corruption" is not unconstitutional for want of sufficient meaning. *See, e.g., United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996)* ("A prohibition against corrupt acts is clearly limited to . . . constitutionally unprotected and purportedly illicit activity.")

In looking at the above, it is worth reviewing language from *Arnett v. Kennedy, 416 U.S. 134, 159, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)*, in which the court held that the standard for terminating federal employees under the Lloyd-La Follette Act -- for "such cause as will promote the efficiency of the service" -- was not unduly vague:

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. The general class of offense to which . . . [the provisions are] directed is plainly within [their] terms. . ., [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise. . . . We do not believe that Congress was confined to the choice of enacting a detailed code of employee conduct. . . .

This reasoning applies with equal force to the California legislature's attempt, via *section 6106*, to address improper attorney behavior. Canatella thus fails to state a claim as to *section 6106*.

2. Provisions Directed at Speech or Expressive Conduct: *California Business and Professions Code §§ 6068(c)* and *(g)*, Rule of Professional Conduct 3-200

a. *California Business and Professions Code § 6068(c)*

Section 6068(c) provides:

> It is the duty of an attorney . . . to counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

Canatella concedes that a law prohibiting attorneys from "maintaining" frivolous lawsuits, one aspect of *section 6068(c)*, is not problematic.[12] To the extent that *section 6068(c)* reaches out-of-court attorney speech by prohibiting attorneys from "counseling" the bringing of only legal and just actions and pleadings, the court must engage in a balancing test to ascertain the law's validity. The task for a court in analyzing laws that target out-of-court attorney speech is to "weigh[] the State's interest in the regulation . . . against [the] lawyer's *First Amendment* interest in the kind of speech . . . at issue." *Gentile, 501 U.S. at 1073*. Here, there is no doubt that the state has a strong interest in ensuring that its lawyers adhere to the highest standards of conduct. Counseling illegal or unjust actions or pleadings has a direct, adverse effect on the administration of the courts.[13] The Court has little difficulty in holding that an attorney's right to counsel illegal and unjust actions is outweighed by the state's interest in maintaining the integrity of its justice system.[14]

i. Overbreadth

Section 6068(c) is no "broader than necessary to protect the State's interests." *Gentile, 501 U.S. at 1077.* *Section 6068(c)* ensures that attorneys counsel clients to bring complaints and maintain arguments before the court that are supported by law or facts. Looking at the wording of the statute, the Court cannot say that its unconstitutional applications substantially exceed its constitutional applications. *New York v. Ferber, 458 U.S. 747, 770, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).* For this reason, Canatella's overbreadth challenge cannot succeed.

ii. Vagueness

Canatella's vagueness challenge to *section 6068(c)* focuses on the words "legal and just," which he claims are "unintelligible and vague." (SAC at ¶ 8.) The Supreme Court, however, has held that the words "just and reasonable" are not unduly vague. *Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 246, 81 L. Ed. 142, 57 S. Ct. 170, 3 F.C.C. 797 (1936).* The Court cannot say that the words "legal and just" are any less clear. Canatella also argues that the "as appear to him or her" language in *section 6068(c)* invites a subjective inquiry into the attorney's state of mind that lulls the attorney who has "crossed the line" but does not know it into a false sense of security. (SAC at ¶¶ 8-9; Opp. at 21-25.) However, the California Supreme Court has adopted the "reasonable attorney" standard for determining violations of *section 6068(c)*, which serves to narrow the scope of the statute. *Sorensen v. State Bar, 52 Cal.3d 1036, 1043, 277 Cal. Rptr. 858, 804 P.2d 44 (1991).* The Court also notes that Canatella's concern about fair notice is remedied in part by the fact that *Rule 11 of the Federal Rules of Civil Procedure* and *California Code of Civil Procedure section 128.7* provide a "safe harbor,"

which allows an attorney who has filed an allegedly groundless action or pleading notice of the grounds on which a sanction may be sought and an opportunity to cure.

iii. Petition Clause

Canatella further contends that *section 6068(c)* violates the Petition Clause of the *First Amendment.* (SAC at P 13.) The *First Amendment* right to petition the government for a redress of grievances, which is "an assurance of a particular freedom of expression,"[15] is "generally subject to the same constitutional analysis" as the right to free speech. *Wayte v. United States, 470 U.S. 598, 610 n.11, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985)* (noting that although "the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis"). Because the Court has already held that Canatella's *Speech Clause* claims fail, so must his *Petition Clause* claim.

iv. Under-Inclusiveness

Finally, Canatella asserts that *section 6068(c)* is *under*-inclusive. (SAC at ¶ 12.) A regulation of speech can be under-inclusive when the state combines the operation of a general speech restriction with an exemption for one or more parties to the debate. *See City of Ladue v. Gilleo, 512 U.S. 43, 51, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994)* (reviewing law that banned all residential signs but those falling within one of ten exemptions). Such a regulation might "attempt to give one side of a debatable public question an advantage in expressing its views to the people," and thereby "control . . . the search for political truth." *Id.* Nothing of the kind is at

work here. *Section 6068(c)* merely prohibits any attorney from counseling or maintaining unjust or illegal actions or pleadings, and provides no exemptions. Canatella fails to state a claim with respect to *section 6068(c)*.

v. Equal Protection Claim

Petitioner also claims that *§ 6068(c)* violates the *Equal Protection Clause*. (SAC, ¶ 11 (alleging that *§ 6068(c)* violates "equal protection because there is no guarantee that attorneys similarly situated to Plaintiff will be treated the same way under the allegedly vague and overbroad discipline statutes.")) Plaintiff does not address this portion of the Bar Defendants' motion to dismiss in his Opposition, but it appears that he bases his equal protection claim on the theory that because the language of *§ 6068(c)* is vague, attorneys engaging in the same improper conduct will not be consistently disciplined. This claim, therefore, appears to be Plaintiff's due process challenge recast as an Equal Protection claim. Because the Court rejects Plaintiff's claim that the statute is vague and overbroad, Plaintiff's Equal Protection fails as well.

b. *California Business and Professions Code § 6068(g)*

Section 6068(g) states that:

> It is the duty of an attorney . . . not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

First, it is clear that *section 6068(g)* satisfies the *Gentile* balancing test. *See Gentile, 501 U.S. at 1073.*

The State's interest in preventing attorneys from using the justice system as a tool to harass or vex another -- the type of conduct at which *section 6068(c)* is aimed -- outweighs the attorney's right to engage in this kind of speech.

I. Overbreadth

Canatella alleges that *section 6068(g)* is overbroad because it lacks a provision protecting attorneys who bring claims that are reasonable but who do so for improper reasons. SAC at ¶ 14. Canatella seems to be arguing that an attorney has a *First Amendment* right to file an action or pleading from a corrupt motive so long as he has a proper legal basis for doing so. It is interesting that he should press this claim, given that in his Opposition he concedes that "raising issues for the sole purpose of harassing opponents or delaying required payments" and "interfering with the due administration of justice in bad faith and with wrongful purpose" are proper targets of the disciplinary laws. (Opp. at 3-4.)

The Ninth Circuit has observed that sanctions are proper where an action is "clearly frivolous, legally unreasonable or without legal foundation, *or* brought for an improper purpose." *Lockary v. Kayfetz, 974 F.2d 1166, 1172 (1992)* (rejecting any constitutional right to abuse the court system) (emphasis added). *See also In re Intel, 791 F.2d 672, 675 (9th Cir. 1986).* This latter problem is precisely what *section 6068(g)* is aimed at discouraging. It is also worth noting that *Rule 11 of the Federal Rules of Civil Procedure* makes sanctionable the bringing of an action "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *See In re*

Sawyer, 360 U.S. 622, 646, 3 L. Ed. 2d 1473, 79 S. Ct. 1376 (1959) (stating that "a lawyer belongs to a profession with inherited standards of propriety and honor[.] . . . He who would follow that calling must conform to those standards") (Stewart, J., concurring). Canatella fails to state an overbreadth claim with respect to *section 6068(g).*

ii. Vagueness

Canatella also takes issue with the language "corrupt motive of passion or interest" in *section 6068(g).* SAC at ¶¶ 14-15. Having already found that the word "corruption" has a definable substance (see above at section (C)(b)(i)), the Court cannot see how the term "corrupt motive of passion or interest" is any less clear. Thus, Canatella's vagueness claim with respect to *section 6068(g)* also fails.

iii. Petition Clause

Canatella further alleges that *section 6068(g)* violates the *Petition Clause.* (SAC at ¶ 16.) Again, however, because the Court finds that *section 6068(g)* does not violate free speech rights under the *First Amendment,* Canatella's *Petition Clause* claim also fails. (*See* discussion of *section 6106,* above.)

iv. Under-Inclusiveness

As he does with respect to *section 6068(c),* Canatella alleges that *section 6068(g)* is under-inclusive. This claim, however, fails for the same reason that his claim with respect to *section 6068(c)* failed. (*See* discussion of *section 6068(c),* above.)

c. California Rule of Professional Conduct 3-200

Rule 3-200 provides that:

> A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 3-200 reads almost verbatim to parts of *Rule 11 of the Federal Rules of Civil Procedure*. Canatella devotes all of two lines in his complaint and six lines in his opposition to *Rule 3-200*, where he suggests that the language "harassing or maliciously injuring" is unduly vague. (SAC at ¶ 27; Opp. at 33.)

First, the Court notes that this provision easily satisfies the *Gentile* balancing test. *See Gentile, 501 U.S. at 1073*. The State's interest in preventing the filing of frivolous lawsuits and those meant merely to harass another outweighs the attorney's right to engage in this kind of speech. Due to the fact that the provision prohibits a narrow range of conduct limited to filing or maintaining frivolous and unsupported claims, the Court does not find that the constitutional applications of *Rule 3-200* would likely exceed the unconstitutional applications. The Court also finds that the term "harassing or maliciously injuring" is not unduly vague. The terms "malicious" and "harassing"

are used repeatedly throughout California's penal and civil code such that a reasonable person would know what conduct is prohibited. *See, e.g., People v. McClelland, 42 Cal.App.4th 144, 151, 49 Cal. Rptr. 2d 587 (1996)* (terms "maliciously" and "harassing" used in stalking statute codified at *Cal. Penal Code § 646.9* was not unconstitutionally vague; the term "maliciously" has "been part of the Penal Code lexicon since 1872"); *Downey Venture v. LMI Ins. Co., 66 Cal.App.4th 478, 494, 78 Cal. Rptr. 2d 142 (1998)* (*citing Sheldon Appel v. Albert & Oliker, 47 Cal.3d 863, 874, 254 Cal. Rptr. 336, 765 P.2d 498 (1989)* (stating that in the context of the tort of malicious prosecution, "malice . . . relates to subjective intent of or purpose of [the conduct] and may range anywhere from open hostility to indifference"). Inquiry into an individual's subjective intent in evaluating whether the individual is liable is common and does not necessarily render the statute unconstitutionally vague. Canatella therefore cannot maintain his claim that the term "harassing or maliciously injuring" as used in *Rule 3-200* is unconstitutionally vague. [16]

D. Canatella's "As Applied" Challenges

In an as-applied challenge, there is a narrow focus on the particular plaintiff's behavior and whether the statute is constitutional as applied to him. *Roulette v. City of Seattle, 97 F.3d 300, 312 (9th Cir. 1996).* Here, Canatella's "as applied" claims look very much like his facial claims. (SAC at ¶¶ 5, 6, 13; Opp. at 17-20.)[17] The Bar Defendants contend that Plaintiff is unable to state an "as applied" claim because he lacks standing to assert such claims in the absence of "a concrete set of facts." (Mot., p. 26.)

The conduct that puts Canatella at risk of imminent prosecution -- zealous advocacy of his clients' causes -- is the same conduct that he argues is chilled by the existence of the challenged provisions, which he attacks on facial grounds. Canatella alleges in his complaint no specific, present disciplinary action being taken by the State Bar against him, nor does he allege anything that indicates that his particular kind of advocacy puts him at risk in a unique way when compared to other attorneys who similarly "push the envelope" in the types of claims they bring.[18] Otherwise, a finding that the statutes are constitutional on their face necessarily means that they are constitutional as applied to Canatella. Therefore, because the Court finds the challenged provisions constitutional, Canatella fails to state an as-applied claim with respect to them.

E. *California Civil Code § 47(b)(2)*

Canatella alleges that the State Bar cannot discipline him in connection with his in-court expression because that expression is protected by the absolute privilege provided by *California Civil Code section 47(b)(2)*. (SAC at P 42). The litigation privilege, as codified in Civil Code *section 47(b)(2)*, shields, among other things, any "publication or broadcast" made "in any . . . judicial proceeding." Its "principal purpose is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Olszewski v. Scripps Health, 30 Cal.4th 798, 830-31, 135 Cal. Rptr. 2d 1, 69 P.3d 927 (2003)*. Canatella points the Court to no case applying *section 47(b)(2)* to shield an attorney from the consequences of inappropriate courtroom conduct. Indeed, if Canatella's interpretation of *section*

47(b)(2) is correct, then the provisions he challenges in this case would be substantially gutted.[19] The Court concludes that *section 47(b)(2)* does not insulate an attorney from disciplinary proceedings based on his in-court actions, and thus this claim fails as well.

F. State Bar's Role as Disciplinary Entity

Canatella appears to argue that because of the reality that trial judges are the front line regulators of attorney conduct, the State Bar somehow concedes that it lacks the power to regulate attorney conduct. He argues this position in his Opposition but does not allege it in his complaint. (Opp. at 33-35.) In any event, this claim lacks merit. The California Supreme Court has long recognized and relied upon the Bar's disciplinary authority and responsibility. *See Obrien v. Jones, 23 Cal. 4th 40, 48, 96 Cal. Rptr. 2d 205, 999 P.2d 95 (2000)* (State Bar's "assistance to [the] court in the disciplinary process is an integral part of the judicial function"). The Court fails to see how the State Bar's recognition of the inherent power of the courts to discipline attorneys is inconsistent with its role as an additional disciplinary entity. Canatella fails to state a claim with respect to this issue.

G. Equal Protection and Due Process Claims

Pursuant to *Cal. Bus. & Prof. § 6086.10(a)*, "[a]ny order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs. In any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs." If the attorney who is charged

is exonerated, the State Bar must reimburse the attorney in an amount determined by the State Bar to be the reasonable expenses incurred in preparing for the hearing. *See Cal. Bus. & Prof. § 6086.10(d).* According to Canatella, the State Bar has a financial interest in imposing a public reproval or discipline on an attorney in order to collect the fees and costs associated with the disciplinary hearing. (SAC ¶ 37 ("the State Bar is in competition with the attorneys it prosecutes and has a pecuniary incentive in finding attorney conduct (or, alleged misconduct) worthy of public discipline, in that it can recover its costs in the preparation or hearing of disciplinary proceedings, and costs incurred in the administrative processing of the disciplinary proceeding only when the proceeding results in public disciplines")). Canatella alleges that his due process rights are being violated by this "pecuniary incentive."[20]

In *Hirsh v. Justices of the Supreme Court, 67 F.3d 708, 714 (9th Cir. 1995)*, the Ninth Circuit held that "[t]he fact that fines imposed in attorney disciplinary proceedings are paid to the treasury of the State Bar does not establish an impermissible financial interest . . . no evidence suggests that [the judges of the State Bar] are in any way dependent on the amount of fines collected or that the State Bar would be unable to pay the salaries of Bar Court judges without the money collected in disciplinary proceedings." To the extent that Canatella's claim is based on allegations that this alleged "pecuniary incentive system" violates his due process rights, he does not state a claim. *Id.* Based on his statement that "the extensive hearing and review procedures in the State Bar Court satisfy due process requirements of notice and a meaningful opportunity to be heard," Plaintiff is unable to allege that some other

aspect of the State Bar disciplinary procedure, aside from the alleged "pecuniary incentive system," violates his due process rights. (SAC, ¶ 33.)

H. State Bar Judges as Defendants

Article III prevents federal courts from adjudicating claims when the parties lack the required adverse legal interests. *Grant v. Johnson, 15 F.3d 146, 147 (9th Cir. 1994).* In the typical prospective assault on the constitutionality of a state statute, "the state judge is not a proper party defendant under *section 1983* because he has no stake in upholding the statute: he is not the plaintiff's adversary, and the complaint should be dismissed for failure to state a claim upon which relief can be granted." *Id. at 148* (quoting *R.W.T. v. Dalton, 712 F.2d 1225, 1232 (8th Cir. 1983)).*

The parties seem to be in agreement that, at least as a general matter, judges adjudicating cases pursuant to state statutes may not be sued under *section 1983* in a suit challenging the state law. (Mot. at 25; Opp. at 10-11). Both sides cite the following language from *Grant* which provides the rationale for its holding:

> no "case or controversy" exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute. Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. . . . Almost invariably, they have played no role in the statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest in following their prior

> decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made (for example, by the United States Supreme Court). In part for these reasons, one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute; that individual's institutional obligations require him to defend the statute. One typically does not sue the court or judges who are supposed to adjudicate the merits of the suit. . . ."

Grant, 15 F.3d at 148 (quoting *In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 21-22 (1st Cir. 1982)).*[21]

Canatella contends that *Grant* does not apply here. He argues that the defendant State Bar Court judges *do* have a "personal or institutional stake" in this controversy.[22] There is another argument that Canatella perhaps mentions, but does not develop, which is that the challenged provisions, among others, provide the State Bar Court's very *raison d'etre.* Here, if the challenged provisions are struck down, powerful weapons in the State Bar Court's arsenal for disciplining attorneys – which is the essence of the State Bar Court's function -- would be lost. Thus, this is not a "typical" case against a judge under *section 1983. Grant, 15 F.3d at 148.* The Court concludes that the adversity of interest necessary to demonstrate the justiciability of a dispute between Canatella and the State Bar Court judges exists in the present case and

that the latter are therefore properly a part of this action. Therefore, the Bar Defendants' motion to dismiss Plaintiff's claims against the State Bar Court judges on the grounds that Plaintiff fails to state a cognizable claim against them is DENIED.

J. *Supremacy Clause*/Exclusive Jurisdiction of the Federal Courts

Canatella alleges in his complaint that the State Bar oversteps its jurisdictional limits and violates the *Supremacy Clause* by basing the decision to initiate disciplinary proceedings against him on its own interpretation of federal law. (*See* SAC ¶¶ 28-31 (stating that "the state court lacks the inherent jurisdiction to make any determinations regarding the propriety of conduct in federal litigation")). What Canatella appears to be claiming is that his conduct in federal court is based on his subjective interpretation of federal law, and that for the State Bar to find that his conduct was inappropriate, it would be required to evaluate whether Canatella's subjective interpretation of federal law was reasonable. (*Id.* at ¶ 28, In. 12-17.) He also alleges that the State Bar may not interfere with the federal court disciplinary proceedings because "a federal court has the undisputed power to control admission to its bar and to discipline attorneys who appear before it." (*Id.* at ¶ 29.) If the federal courts decline to suspend or disbar an attorney following disciplinary proceedings, Canatella alleges that the State Bar may not pursue disciplinary proceedings based on the same conduct. (*Id.* at ¶ 30.) He also claims that if the federal courts do sanction an attorney, the State Bar should not be allowed to rely on the order

imposing sanctions in the State Bar proceedings as proof of attorney misconduct. (*Id.* at ¶ 31.)

Canatella cannot state a claim that the *Supremacy Clause* has been violated. The United States Supreme Court has recognized the State's sovereign right and responsibility to regulate the conduct of attorneys within its borders. *See, e.g., Hoover v. Ronwin, 466 U.S. 558, 569 n.18, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984).* Canatella apparently concedes this issue, because he offers nothing by way of response in his opposition. Based on the foregoing, he fails to state a claim as to this issue and his *Supremacy Clause* claim is dismissed.

I. Procedure for Abatement

Canatella alleges in his complaint that "[t]he challenged discipline statutes contain no procedural safeguards to ensure that the initiation of disciplinary action against attorneys does not interfere with ongoing federal discipline proceedings." (SAC at ¶¶ 32-34; Hearing Trans. 28:17-23.)[23] As a result he claims that his due process rights have been violated. (*Id.* at 28:17-23.) Canatella's argument is directly contradicted by Rule 116 of the California State Bar Rules of Procedure, which provides for abatement "upon motion by any party." This provision was highlighted by the Bar Defendants in their motion to dismiss but Canatella did not provide any response in his opposition. Because a procedure exists that addresses the injury claimed by Canatella here, his claim fails and is dismissed.

J. Plaintiff's Complaint is Dismissed Without Leave to Amend.

Leave to amend "shall be freely given when justice so requires" to facilitate a proper decision on the merits.

Fed. R. Civ. P. 15(a). This standard is applied with "extreme liberality." *See McKenzie v. Milpitas, 738 F. Supp. 1293, 1298 n.5 (N.D. Cal. 1990); DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).* Leave to amend lies "within the sound discretion of the trial court." *United States v. Webb, 655 F. 2d 977, 979 (9th Cir 1981).* When there is a lack of prejudice to the opposing party and the amended complaint is not frivolous, or made as a dilatory maneuver in bad faith, the court should exercise its discretion to grant leave. *See United States v. Pend Oreille Pub. Util. Dist. No. l, 926 F.2d 1502, 1511 (9th Cir. 1991), citing Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973).*

The Court concludes that any amendment to Canatella's complaint would be futile and as a result, declines to exercise its discretion to grant Canatella leave to file an amended complaint. Canatella has already had two previous opportunities to amend his complaint. Additional facts or claims alleged by Canatella in a third amended complaint would not cure the underlying deficiencies in his complaint, and would likely not alter the Court's analysis that Canatella does not state a claim as a matter of law.

CONCLUSION

For the foregoing reasons, the Court HEREBY DENIES the Bar Defendants' motion to dismiss pursuant to *Rule 12(b)(1)* for lack of standing, and GRANTS the Bar Defendants' motion to dismiss Canatella's Second Amended Complaint with prejudice pursuant to *Rule 12(b)(6).* The clerk is directed to close the file.

IT IS SO ORDERED.

Dated: February 16, 2005

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

Footnotes

n1 The Bar Defendants' request for judicial notice filed on January 28, 2003, Plaintiff's Request for Judicial Notice filed on August 22, 2004, and Plaintiff's Supplemental Request for Judicial Notice filed on September 15, 2003, are HEREBY DENIED as moot on the grounds that the Court did not need to rely on the material submitted in the requests for judicial notice in reaching its decision. Plaintiff's request filed on November 18, 2004, that the Court take Judicial Notice of an order issued by the Honorable Martin J. Jenkins on September 16, 2004 is likewise DENIED as moot for the same reasons.

n2 The following facts are taken directly from the Ninth Circuit's decision reversing and remanding this matter to the district court. *See Canatella v. State of California, 304 F.3d 843, 847-48 (9th Cir. 2002)* ("*Canatella I* ").

n3 The challenged provisions state:

(1) "It is the duty of an attorney . . . to counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." *Cal. Bus. & Prof. Code § 6068(c)*;

(2) "It is the duty of an attorney . . . not to encourage either the commencement or the continuance of an

action or proceeding from any corrupt motive of passion or interest." *Cal. Bus. & Prof. Code § 6068(g)*;

(3) "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." *Cal. Bus. & Prof. Code § 6103*;

(4) "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." *Cal. Bus. & Prof. Code § 6106*;

(5) "A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." *Cal. R. Prof'l Conduct 3-200.*

n4 At the time Canatella filed his current *section 1983* claim, no state court or State Bar disciplinary proceedings were pending against him. Canatella had reported the magistrate judge's sanctions order to the State Bar, and had appealed that order to the Ninth

Circuit. The magistrate judge stayed the order pending resolution of Canatella's appeal of the sanction, which was vacated by the Ninth Circuit on February 20, 2001. *See Chan v. Bay Area Air Quality Mgmt. Dist., 2 Fed. Appx. 861, 866 (9th Cir. 2001).*

n5 While that appeal was pending, two significant events occurred. First, as noted, the Ninth Circuit vacated the magistrate judge's sanction order. Second, Canatella completed his probationary sentence under the stipulated settlement and final order issued by the Supreme Court of California in the original State Bar proceedings.

n6 The standard ultimately adopted by the *Gentile* court is the one the Bar Defendants suggest in their reply: whether the speech targeted by the challenged provisions poses a "strong likelihood of material prejudice" to the integrity and fairness of the judicial system. (Reply at 6 (*citing Gentile, 501 U.S. at 1074-75.*)) *Gentile*, however, was decided in the context of *pending* cases, the speech relating to which can cause particular problems to the fair administration of the justice system. In *Gentile*, the attorney's client had just been indicted, and the attorney held a press conference that the State believed might detrimentally affect the trial. The attorney was sanctioned as a result, and he filed suit to challenge the validity of the sanction. The Court noted that the "strong likelihood of material prejudice" standard constituted "a constitutionally permissible balance between the *First Amendment* rights of attorneys in *pending* cases and the State's interest in fair trials." *Id. at 1075* (emphasis added). The speech at issue in this case, however, is not limited to that made while a case is pending. For example, *California Business & Professions Code section*

6068(g) prohibits attorneys from encouraging the "commencement" of an action from any corrupt motive of passion or interest. Therefore, the Court will use the balancing test for out-of-court attorney speech set forth in the text above.

n7 Some of the provisions would trigger the *Sammartano* test (see above at section B) because they affect in-court speech or expressive activity. However, the Court applies *Gentile's* stricter test for out-of-court speech throughout this opinion because if a law satisfies the *Gentile* test (which all of the challenged provisions do), *a fortiori* it satisfies the *Sammartano* test.

n8 The Court is cognizant of the Ninth Circuit's statement in *Canatella I* that each of the challenged provisions targets expression or conduct commonly associated with expression. *304 F.3d at 853 n. 12.* The Ninth Circuit, however, did not decide whether and to what degree the challenged provisions burden speech, and it explicitly declined to reach the merits of Canatella's claims. *Id. at 855 n.16.*

n9 Defendants argue that Plaintiff does not have standing to bring a "facial" or "as-applied" challenge to either *§ 6103* or *§ 6106* because the court ordered sanctions against Plaintiff "fall squarely within the provisions of *section 6103* and *6016*." (*See* Mot. p. 28.) Because the Court reaches the merits of Plaintiff's claims and finds them insufficient, Defendants' motion to dismiss on this ground is DENIED as moot.

n10 Canatella does not ask the Court to sever any portions of any of the challenged provisions. Instead, he argues that the suspect provisions should be voided *in toto. (See, e.g.,* Opp. at 25.)

n11 Because the Court reaches the merits of Plaintiff's vagueness claims, the State Bar Defendants' motion to dismiss these claims on the grounds that Plaintiff is judicially estopped from asserting them is DENIED as moot.

n12 But Canatella's concession only extends to the maintaining of truly "sham lawsuits." (Opp. at 3 n.3 (emphasis in original)). Canatella goes on to note that he objects to the discipline rules being applied to restrain "the advocacy of attorneys seeking redress on behalf of clients for allegedly unconstitutional acts of government officials." (*Id.*) Canatella's emphasis on the word "sham" and subsequent comments indicate that he believes truly sham lawsuits are legitimately punishable, but that his type of work does not fall in this category. Of course, this Court is not reviewing the particulars of a specific disciplinary action taken by the State Bar against Canatella, nor is the Court evaluating anything that has transpired in the past. As Canatella has made quite clear, "this case is *not* about the historical record." (Opp. at 1 (emphasis in original)). If the State Bar should, in the future, discipline Canatella for the filing of a pleading or lawsuit that is *not* sham, he has recourse to the courts in the form of an "as applied" challenge.

To the extent Canatella suggests that a frivolous "constitutional or civil rights" claim encompassing criticism directed explicitly at the State is entitled to more *First Amendment* protection than a frivolous commercial action (Opp. at 2, 23, 26), the Court is dubious. The authority to which Canatella points for this proposition (*Gentile, 501 U.S. at 1034; In Re Primus, 436 U.S. 412, 432, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978))* does not support it. Referring to the

frivolous filing of civil rights-type versus commercial lawsuits, the Bar Defendants note that "[b]oth are equally harmful to the civil justice system and to the parties who must defend them." (Rep. at 7.) The Court agrees. The Ninth Circuit's statements on this issue are telling: "we will sanction misconduct even where the responsible party claims noble motives. . . . [S]tatus as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits." *Lockary v. Kayfetz, 974 F.2d 1166, 1172 (9th Cir. 1992).*

n13 Plaintiff's reliance on *Legal Services Corp. v. Velazquez, 531 U.S. 533, 536, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001)* is misplaced. In that case, the United States Supreme Court struck down an provision in the Legal Services Corporation Act that restricted attorneys working for organizations that provided legal advice for welfare benefit claims from "arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution." There, unlike here, the challenged provision was not viewpoint neutral and had the effect of "insulat[ing] the Government's interpretation of the Constitution from judicial challenge." *Id. at 548.* The provisions challenged by Canatella place no such restriction on an attorney's speech but rather impose a content-neutral restriction on in-court frivolous, vexatious, or misleading speech.

n14 Of course, if an attorney is actually disciplined under *section 6068(c)* for speech he or she deems protected by the *First Amendment*, an "as applied" challenge would lie. The Court is not presented with that case here.

n15 *McDonald v. Smith, 472 U.S. 479, 482, 86 L. Ed. 2d 384, 105 S. Ct. 2787 (1985).*

n16 Canatella also suggests -- in his Opposition (not in his SAC) -- that the word "defense" lacks sufficiently clear meaning to give attorneys fair notice. (Opp. at 33.) The Court rejects this out of hand. Canatella points the Court to no case standing for this proposition, nor could the Court find one, perhaps because the word "defense" is so widespread and commonly used in the law that no one has seen fit to challenge it on vagueness grounds. Attorneys of "common intelligence" do not have to "guess at its meaning and [do not] differ as to its application." *United States v. Lanier, 520 U.S. 259, 266, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997).*

n17 One scholar has suggested that overbreadth and vagueness claims are, by nature, facial. E. Chemerinsky, *Constitutional Law*, § 11.2 (2d Ed. 2002) ("Both vagueness and overbreadth involve facial challenges to laws").

n18 Canatella states in his opposition that "this case is not about the historical record even as [the Bar Defendants] attempt to portray it." (Opp., p. 1.)

n19 In construing statutes, the Court is guided by the well-settled principle that, where possible, laws should be read to avoid conflict. *Walters v. Weed, 45 Cal.3d 1, 9, 246 Cal. Rptr. 5, 752 P.2d 443 (1988)* ("statutes that are apparently in conflict should, if reasonably possible, be reconciled").

n20 Canatella clarified at the hearing that he is alleging that his due process rights, and not Equal Protection rights, are violated by the "pecuniary bias" that exists in the State Bar proceedings. (*See* February 20, 2004 Hearing Transcript. 26:3-28:16; 41:22-43:4.) Canatella

also confirmed that he is also not pursuing a selective prosecution claim based on these facts. (*Id.* stating that "I thought there might be some selective prosecution equal protection claim, but now that we've sorted it out, your Honor, I'm in accord that it is a due process claim."))

n21 Not content to rest on this passage from *Grant*, the Bar Defendants argue that "[t]he Ninth Circuit has also unequivocally held that California State Bar Court proceedings are judicial in nature and that the judges of the California State Bar Court are entitled to quasi-judicial immunity." Mot. at 26 (*citing Hirsh v. Justices of Supreme Court, 67 F.3d 708, 715 (9th Cir. 1995)).* While the Ninth Circuit held that State Bar Court judges are immune from suits seeking monetary damages, it did not address whether individual State Bar Court judges can be sued for injunctive relief in their official capacities, as they are in this case.

n22 *Obrien v. Jones, 23 Cal.4th 40, 54(2000)*, cited by Canatella, is inapposite. That case in fact rejected the contention -- put forth by Canatella -- that State Bar Court judges are "judicial assistants," "subordinate judicial officers," special masters," or "referees."

n23 At the hearing, Canatella claimed that his due process rights were violated by the State Bar's failure to abate disciplinary proceedings "while the target for discipline completes the proceedings in a state or federal court that give rise to the discipline, that the Bar should abate awaiting the outcome of the federal or state proceedings; that doesn't happen oftentimes and we say that is a due process violation." (Hearing Trans. 28:19-23.)

Filed: 2/6/07
No. 05-15447

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD A. CANATELLA,

Plaintiff - Appellant,

v.

RONALD W. STOVITZ, Presiding Judge of the State Bar Court, San Francisco; JUDITH A. EPSTEIN, Review Judge, San Francisco; MADGE S. WATAI, Review Judge, Los Angeles; RICHARD A. HONN, Hearing Judge, Los Angeles; PATRICE E. MCELROY, Hearing Judge, San Francisco; ALBAN I. NILES, Hearing Judge, Los Angeles; JOANN M. REMKE, Hearing Judge, San Francisco; ROBERT M. TALCOTT, Supervising Hearing Judge, Los Angeles; JAMES E. HERMAN, President of the Board of Governors of the State Bar of California; MICHAEL NISPEROS, JR., Chief Trial Counsel; RICHARD A. PLATEL, Hearing Judge, Los Angeles; JOHN VAN DE KAMP, President of the Board of Governors of the State Bar of California; RUSSELL MICHAEL NISPEROS, JR., Chief Trial Counsel,

Defendants - Appellees.

ORDER

Before: WALLACE and BYBEE, Circuit Judges, and

PREGERSON,* District Judge.

Appellant has filed two post-decision motions in this case. First, pursuant to Circuit Rule 36-4, appellant requests publication of our unpublished memorandum disposition. Second, appellant seeks leave to file what he labels "a certified, unedited transcript of the Court's tape of oral argument in this appeal." Both motions are DENIED.

The panel has voted to deny appellant's petition for rehearing. Judge Bybee voted to deny the petition for rehearing en banc, and Judge Pregerson recommends denying the petition for rehearing en banc. Judges Wallace recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellant's petition for rehearing and petition for rehearing en banc, filed December 20, 2006, is DENIED.

Footnote

*The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.